252 N.C. App.—No. 1 Pages 1-93

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 2, 2019

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
PHIL BERGER, JR.[1]
HUNTER MURPHY[2]
JOHN S. ARROWOOD[3]
TOBIAS S. HAMPSON[4]
ALLEGRA K. COLLINS[5]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL. JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[6]
J. DOUGLAS McCULLOUGH [7]
WENDY M. ENOCHS[8]
ANN MARIE CALABRIA[9]
RICHARD A. ELMORE[10]

[1]Sworn in 1 January 2017. [2]Sworn in 1 January 2017. [3]Appointed 24 April 2017, elected 6 November 2018, and sworn in for full term 3 January 2019. [4]Sworn in 1 January 2019. [5]Sworn in 1 January 2019. [6]Retired 31 December 2016. [7]Retired 24 April 2017.
[8]Appointed 1 August 2016. Term ended 31 December 2016. [9]Retired 31 December 2018. [10]Retired 31 December 2018.

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis[11]
Jaye E. Bingham-Hinch[12]

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

[11]Retired 31 August 2018. [12]Began 13 August 2018.

COURT OF APPEALS

CASES REPORTED

FILED 21 FEBRUARY 2017

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Appeal and Error—interlocutory orders and appeals—failure to comply with discovery—contempt proceeding—Although as a general rule an order compelling discovery is not immediately appealable, a contempt proceeding for failure to comply with an earlier discovery order is immediately appealable. **Li v. Zhou, 22.**

Appeal and Error—objection below—no ruling obtained—Plaintiff's contentions concerning the allegations of opposing counsel and evidence were not considered on appeal where plaintiff did not receive a ruling on his objection below. **Williams v. Rojano, 78.**

Appeal and Error—preservation of issues—failure to object—Although defendant contended that the trial court erred by admitting testimony indicating that he had spent time in prison, defendant failed to preserve this issue for appellate review or for plain error review. **State v. China, 30.**

Appeal and Error—preservation of issues—motion to suppress identification—Although defendant argued that the trial court erred by denying his motion to suppress any identifications conducted in violation of the Eyewitness Identification Reform Act, defendant failed to preserve this issue. **State v. Gullette, 39.**

issue was never explicitly addressed thereafter should not bar defendant's claim. **State v. Hyman, 46.**

Criminal Law—motion for appropriate relief—findings—not germane—The conclusion that defendant's claim in a motion for appropriate relief was meritless for lack of evidentiary support was not supported by the findings, which were not germane to defendant's claim. The issue involved an exculpatory witness claim involving a prior conversation between one of defendant's counsel and a State's witness and the counsel's contemporaneous notes. **State v. Hyman, 46.**

DIVORCE

Divorce—equitable distribution—marital property—military retirement benefits—alimony—The trial court did not err by entering summary judgment in favor of plaintiff wife on claims to alter the split of defendant husband's military retirement benefits and to terminate alimony. **Gurganus v. Gurganus, 1.**

Divorce—equitable distribution—subject matter jurisdiction—date of separation—The trial court had jurisdiction to enter an equitable distribution order. Regardless of whether the parties were separated at the time plaintiff wife filed the complaint, the record was clear that the parties were separated by the time defendant husband asserted his claim for equitable distribution. **Gurganus v. Gurganus, 1.**

ESTATES

Estates—request for accounting—potential beneficiary—The trial court did not err by dismissing plaintiff daughter's request for an accounting. Plaintiff failed to cite any legal authority for the proposition that her present status as a potential beneficiary of her mother's estate would entitle her to an accounting of defendant son's actions as the mother's attorney-in-fact. **Hauser v. Hauser, 10.**

FIDUCIARY RELATIONSHIP

Fiduciary Relationship—breach of fiduciary duty—constructive fraud—The trial court did not err by dismissing plaintiff daughter's claims for breach of fiduciary duty and constructive fraud. While plaintiff's complaint alleged the existence of a fiduciary relationship between defendant son and his wife with the parties' mother, nowhere did plaintiff allege the existence or breach of a fiduciary duty owed by defendants to plaintiff. **Hauser v. Hauser, 10.**

FRAUD

Fraud—constructive—excess garnishment of wages—no fiduciary relationship—The trial court did not err by granting defendants' motion to dismiss plaintiff's claims for constructive fraud/breach of fiduciary duty by finding that plaintiff's complaint failed to state a claim upon which relief could be granted. The courts in North Carolina have not found a fiduciary relationship where the relationship between the parties is that of debtor-creditor. **Williams v. Rojano, 78.**

JUDGMENTS

Judgments—default judgment—requirement to attend deposition—damages—title to property—The trial court did not abuse its discretion in a conspiracy,

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2019:

January 14 and 28

February 11 and 25

March 11 and 25

April 8 and 22

May 6 and 20

June 3

July None Scheduled

August 5 and 19

September 2 (2nd Holiday), 16 and 30

October 14 and 28

November 11 (11th Holiday)

December 2

Opinions will be filed on the first and third Tuesdays of each month.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

MARY N. GURGANUS, PLAINTIFF
v.
CHARLES M. GURGANUS, DEFENDANT

No. COA16-163

Filed 21 February 2017

1. Divorce—equitable distribution—subject matter jurisdiction —date of separation

The trial court had jurisdiction to enter an equitable distribution order. Regardless of whether the parties were separated at the time plaintiff wife filed the complaint, the record was clear that the parties were separated by the time defendant husband asserted his claim for equitable distribution.

2. Divorce—equitable distribution—marital property—military retirement benefits—alimony

The trial court did not err by entering summary judgment in favor of plaintiff wife on claims to alter the split of defendant husband's military retirement benefits and to terminate alimony.

Appeal by defendant from orders entered 3 September 2015 by Judge William M. Cameron III in Onslow County District Court. Heard in the Court of Appeals 25 August 2016.

Sullivan & Tanner, P.A., by Mark E. Sullivan and Ashley L. Oldham, for plaintiff-appellee.

The Lea/Schultz Law Firm, P.C., by James W. Lea III and Paige E. Inman, for defendant-appellant.

McCULLOUGH, Judge.

Charles M. Gurganus ("defendant") appeals from summary judgment orders entered in favor of Mary N. Gurganus ("plaintiff") concerning the termination of alimony, plaintiff's share of defendant's military retirement benefits, and maintenance of a Survivor Benefit Plan ("SBP") to the benefit of plaintiff. For the following reasons, we affirm.

I. Background

Plaintiff and defendant were married on 1 April 1978. On 15 March 2001, plaintiff filed a complaint in Onslow County District Court seeking a divorce from bed and board on grounds of adultery, constructive abandonment, alcohol abuse, and other indignities to render plaintiff's condition intolerable and life burdensome. Along with the divorce from bed and board, plaintiff sought alimony, custody of their minor child, child support, possession of the marital residence, attorneys fees, post separation support, and equitable distribution.

On 2 May 2001, the trial court entered a temporary order requiring "defendant . . . to pay to plaintiff as postseparation and as support for the minor daughter, the sum of $3,500.00 per month . . . ." The temporary order was entered *nunc pro tunc* to the hearing date, 27 April 2001.

Defendant filed an answer and counterclaim on 29 May 2001, in which defendant denied the allegations asserted as the bases of plaintiff's claim for divorce from bed and board. Defendant also asserted his own claims for a divorce from bed and board and equitable distribution, while seeking to avoid paying alimony and attorneys fees. Plaintiff submitted a reply on 22 June 2001.

The matter came on for hearing during the 10 September 2001 term of Onslow County District Court. Judgment was entered on 5 April 2002, *nunc pro tunc* 10 September 2001. That judgment granted plaintiff a divorce from bed and board from defendant, ordered defendant to pay alimony to plaintiff, and equitably distributed the marital property with an unequal distribution to the benefit of plaintiff. As part of the equitable distribution, plaintiff was to receive a percentage of defendant's military retirement benefits, including amounts to be paid under defendant's SBP. An additional order concerning defendant's SBP coverage was entered with the consent of the parties on 8 April 2003.

Following a 31 July 2003 hearing on the court's own Rule 60(a) motion, an order was entered on 8 August 2003, *nunc pro tunc* 31 July 2003, to correct a clerical mistake in the 5 April 2002 judgment.

Years later after defendant retired from the military, on 7 July 2014, defendant filed a motion in the cause asserting three claims. First, defendant sought termination or reduction of alimony because plaintiff would be receiving a percentage of his military retirement benefits. Second, defendant sought a declaratory judgment regarding use of the "Seifert Formula" in the 5 April 2002 judgment to calculate plaintiff's allotment of defendant's military retirement benefits contending that plaintiff should not benefit from his rise in the military ranks and the corresponding increase in his retirement benefits that was attained due to his active efforts post-separation. Third, defendant sought to have the expense of the SBP assigned to plaintiff.

On 23 September 2014, defendant filed a motion to amend his motion in the cause to add a fourth claim, that his active efforts to rise in the military ranks and improve his income and plaintiff's actions against him to impede his advancement "constitutes a material and substantial change in circumstances warranting a modification of the [judgment] pursuant to the case of *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (N.C. Ct. App. 2002), aff'd, 579 S.E.2d 248 (N.C. 2003)." Discovery then ensued.

On 1 April 2015, plaintiff filed a motion for summary judgment on grounds that *res judicata* barred reconsideration of plaintiff's share of defendant's retirement benefits and defendant's SBP coverage. Plaintiff's summary judgment motion came on for hearing in Onslow County District Court before the Honorable William M. Cameron III on 19 August 2015. On 3 September 2015, the court entered three separate orders granting summary judgment in favor of plaintiff on each of the three claims asserted in defendant's 7 July 2014 motion in the cause. The court determined there was no basis in the law for granting defendant's motion in the cause; therefore, plaintiff was entitled to a percentage of defendant's retirement benefits as calculated in the 5 April 2002 judgment and defendant was responsible for the SBP premium as set forth in the 8 April 2003 order.

Defendant filed notice of appeal from each of the three summary judgment orders on 22 September 2015.

II. Discussion

On appeal, defendant argues the trial court erred in entering summary judgment because genuine issues of material fact exist as to whether purposeful acts by both parties amount to a substantial change in circumstances that warrants modification of the 5 April 2002 judgment. Defendant also asserts that the equitable distribution in the 5 April 2002 judgment is invalid because the trial court lacked subject matter jurisdiction. We address these issues in reverse order.

1. Jurisdiction

[1] For the first time in the long history of this case, defendant now challenges the court's jurisdiction to enter the equitable distribution portion of the 5 April 2002 judgment. While it is clear that this is the first time the trial court's subject matter jurisdiction has been challenged in this case, our law is equally clear that issues challenging subject matter jurisdiction may be raised at any time, even for the first time on appeal. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986) ("The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court."). Thus, the issue is properly before this Court.

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Regarding equitable distribution, N.C. Gen. Stat. § 50-21(a) provides, in pertinent part, that:

> [a]t any time after a husband and wife begin to live separate and apart from each other, a claim for equitable distribution may be filed and adjudicated, either as a separate civil action, or together with any other action brought pursuant to Chapter 50 of the General Statutes, or as a motion in the cause as provided by G.S. 50-11(e) or (f).

N.C. Gen. Stat. § 50-21(a) (2015).

As detailed above, in this case plaintiff filed a complaint for divorce from bed and board on 15 March 2001 and defendant responded by filing an answer and counterclaim for a divorce from bed and board on 29 May 2001. In those pleadings, both plaintiff and defendant prayed that the court equitably distribute the marital property unequally in their respective favors. Yet, there is no separation date alleged in those pleadings. The first mention of a separation date in the record is in the 2 May 2001 temporary support order, in which the court found that plaintiff and defendant "lived together as husband and wife until on or about March 22, 2001 when the defendant began to move his personal clothing and items from the marital residence." The court then found, again, that the parties separated on approximately 22 March 2001 in the 5 April 2002 judgment.

Both parties agree that, under N.C. Gen. Stat. § 50-21(a), the separation of the parties provides the court with subject matter jurisdiction to

adjudicate a claim for equitable distribution. But defendant claims the court lacked jurisdiction to enter the equitable distribution portion of the judgment in this case because neither party alleged a separation date in their pleadings. Defendant also claims that neither plaintiff nor his pleadings contained a proper claim for equitable distribution because it was only mentioned in the prayers for relief and, in both pleadings, was paired with a claim for divorce from bed and board, indicating the parties had not separated. We disagree with both of defendant's arguments.

We first note that this Court has held that "a pleading requesting the court to enter an order distributing the parties' assets in an equitable manner is sufficient to state a claim for equitable distribution." *Coleman v. Coleman*, 182 N.C. App. 25, 28, 641 S.E.2d 332, 336 (2007) (citing *Hunt v. Hunt*, 117 N.C. App. 280, 450 S.E.2d 558 (1994)). Thus, the prayers for relief in both pleadings put the parties on notice that both sought equitable distribution and those requests were sufficient to state a claim for equitable distribution. Moreover, the mere fact that the equitable distribution claims were asserted alongside claims for a divorce from bed and board does not defeat the equitable distribution claims. Defendant has cited no authority for his assertion that such claims are improper together and we have found no such authority. In fact, a review of cases shows that claims for a divorce from bed and board and equitable distribution are often paired together in pleadings.

Concerning the required separation of the parties as a prerequisite for jurisdiction to adjudicate an equitable distribution claim, there is no indication in the record that the parties were separated at the time plaintiff filed her complaint. The record does show, however, that the parties separated on or about 22 March 2001, before defendant filed his answer and counterclaim. Defendant also alleges in his answer and counterclaim that he commuted weekly to North Carolina from where he was stationed in Virginia to visit plaintiff and their children until it became clear that reconciliation was impossible, then defendant stopped making weekly trips. Therefore, regardless of whether the parties were separated at the time plaintiff filed the complaint, the record is clear that the parties were separated by the time defendant asserted his claim for equitable distribution. Therefore the trial court did have subject matter jurisdiction to equitably distribute the marital property.

2. Summary Judgment

[2] Defendant also challenges the trial court's grant of summary judgment in favor of plaintiff on the claims in his 7 July 2014 motion in the cause. Specifically defendant contends the trial court erred in entering

summary judgment with respect to his claims to alter the plaintiff's share of his military retirement benefits and to terminate alimony. We disagree in both instances.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)).

A. Retirement Benefits

Concerning the division of defendant's military retirement benefits for purposes of equitable distribution, the Court has previously addressed the permissible methods of division in *Seifert v. Seifert*, 319 N.C. 367, 354 S.E.2d 506 (1987). In that case, the issue before the Court was "whether the trial court erred in deferring, until actual receipt, an anticipated award of military pension and retirement benefits calculated under a present value valuation method." *Id.* at 367, 354 S.E.2d at 507. In deciding that the court did err, the Court concluded that "both present value and fixed percentage are permissible methods of evaluating pension and retirement benefits in arriving at an equitable distribution of marital property." *Id.* at 371, 354 S.E.2d at 509. The Court further explained the fixed percentage method as follows:

> Under this method if, after valuing the marital estate, the court finds a distributive award of retirement benefits necessary to achieve an equitable distribution, the nonemployee spouse is awarded a percentage of each pension check based on the total portion of benefits attributable to the marriage. The portion of benefits attributable to the marriage is calculated by multiplying the net pension benefits by a fraction, the numerator of which is the period of the employee spouse's participation in the plan during the marriage (from the date of marriage until the date of separation) and the denominator of which is the total period of participation in the plan. The nonemployee spouse receives this award only if and when the employee spouse begins to receive the benefits.
>
> Under the fixed percentage method, deferral of payment is possible without unfairly reducing the value of the award. The present value of the pension or retirement benefits is not considered in determining the percentage to which the

> nonemployee spouse is entitled. Moreover, because the nonemployee spouse receives a percentage of the benefits actually paid to the employee spouse, the nonemployee spouse shares in any growth in the benefits. Yet, the formula gives the nonemployee spouse a percentage only of those benefits attributable to the period of the marriage, and that spouse does not share in benefits based on contributions made after the date of separation.
>
> Finally, so long as the trial court properly ascertains the net value of the pension and retirement benefits to determine what division of the property will be equitable, application of the fixed percentage method does not . . . violate the mandate that the court must identify the marital property, ascertain its net value, and then equitably distribute it. On the contrary, valuation of these benefits, together with other marital property, is necessary to determine the percentage of these benefits that the nonemployee spouse is equitably entitled to receive.

Id. at 370-71, 354 S.E.2d at 509 (internal citations omitted). Subsequent to *Seifert*, the Court's analysis was codified in N.C. Gen. Stat. § 50-20.1.

In this case, the court used the fixed percentage method to determine the portion of defendant's military retirement benefits to allocate to plaintiff. The Court provided the following formula in the 5 April 2002 judgment: (23 years / total years of defendant's service) x 50% = % to be paid to the plaintiff.

On appeal, defendant recognizes that *Seifert* controls the division of military retirement benefits in North Carolina. Yet, defendant claims that he "raises a novel question of law regarding the application of *Seifert* to pension division and whether there should be a narrow set of circumstance that allow modification of an equitable distribution order if the failure to do so results in manifest unfairness . . . ." Defendant further claims "[t]he instant case is an example of how while the fixed percentage method does not unfairly reduce a non-employee spouse's award, it does, at times, unfairly *inflate* the amount received by the non-employee spouse and results in a grossly different valuation than the present value method of valuation." Thus, defendant requests that this Court consider a different method of valuation based on changes in circumstances. Those changes in circumstances are alleged acts by plaintiff to thwart defendant's advancement in the military and defendant's active efforts to advance his military career.

Upon review, we are not convinced that the equitable distribution portion of the judgment should be altered due to the alleged changes in circumstances. Although defendant admits that the law favors finality of equitable distribution judgments, defendant relies on this Court's decision in *White v. White*, 152 N.C. App. 588, 568 S.E.2d 283 (2002), *aff'd per curiam*, 357 N.C. 153, 579 S.E.2d 248 (2003), to argue that this Court has allowed modification of orders based on changes of circumstances in the past.

Upon the parties divorce in *White*, a consent order was entered incorporating an agreement by the parties for the distribution of the marital property, including that defendant was entitled to one-half of the plaintiff's pension accumulated during the marriage. *Id.* at 590, 568 S.E.2d at 284. Years later, after the plaintiff retired and defendant began receiving benefits from plaintiff's pension, plaintiff applied for and began receiving disability benefits, which in turn caused the amount of benefits classified as retired pay to decrease and resulted in a significant decrease in the amount of benefits available to defendant. *Id.* at 590-91, 568 S.E.2d at 284. As this Court explained, "[i]n short, [the] plaintiff unilaterally acted so as to diminish [the] defendant's share of [the] plaintiff's monthly benefits while simultaneously maintaining his own monthly benefits, as well as increasing his after-tax income." *Id.* at 591, 568 S.E.2d at 284. As a result, the defendant filed a motion in the cause seeking a modified or amended qualifying order increasing her percentage of plaintiffs' retired pay. *Id.* at 591, 568 S.E.2d at 284. On appeal of the denial of her motion, this Court held the trial court erred. *Id.* at 592, 568 S.E.2d at 285.

Upon review of *White*, we agree with plaintiff's assertion that *White* is distinguishable from the present case. In *White*, this Court allowed modification where the plaintiff had, subsequent to the equitable distribution order, elected to receive disability benefits in place of retired pay and, thereby, diminished the benefits to be received by the defendant. In that instance, modification was allowed to enforce the intent of the original equitable distribution order. In the present case, defendant attempts to modify plaintiff's allocation of his military retirement benefits because those benefits have increased post-separation as a result of his continued military service; which was foreseeable at the time the court entered the 5 April 2002 judgment. We hold *White* does not control in this case.

The formula used by the court to calculate the fixed percentage of defendant's military retirement benefits to be awarded to plaintiff is exactly the formula set forth in *Seifert* and N.C. Gen. Stat. § 50-20.1(d). We decline defendant's request to consider a new formula and agree

with the trial court that "[t]here is no basis in law for granting [d]efendant's motion or amended motion[;]" therefore, "[p]laintiff is entitled to a share of the [d]efendant's military retired pay as stated in the April 5, 2002 judgment . . . ."

B. Alimony

On appeal, defendant also argues the trial court erred in entering summary judgment on his claim to terminate the alimony awarded in the 5 April 2002 judgment. We are not convinced the order sought by defendant is necessary.

The pertinent decretal portions of the judgment required defendant to pay $2,500.00 per month to plaintiff as alimony and provided for the reduction of alimony payments as follows:

> Further, at such time as plaintiff begins to receive her portion of the defendant's military retirement pay, the defendant may reduce the amount of alimony he pays by the actual sum received by the plaintiff from the military retirement pay such that the plaintiff receives a total of $2,500.00 per month.

Defendant asserts, and the record shows, that the amount of defendant's retirement pay received by plaintiff is greater than the alimony ordered in the judgment. Therefore, under the terms of the judgment, and without further order of the court, defendant is entitled to reduce the alimony paid to zero. Because defendant is no longer required to pay any alimony under the terms of the judgment, an additional order terminating alimony would be of no consequence. Thus, we hold the trial court did not err in entering summary judgment.

III. Conclusion

For the reasons discussed above, we hold the trial court had jurisdiction to equitably distribute the marital property in the 5 April 2002 judgment and did not later err in granting summary judgment in favor of plaintiff on the claims asserted in defendant's 7 July 2014 motion in the cause. The trial court's orders are affirmed.

AFFIRMED.

Judges HUNTER, Jr., and DIETZ concur.

TERESA KAY HAUSER, PLAINTIFF
v.
DARRELL S. HAUSER AND ROBIN E. WHITAKER HAUSER, DEFENDANTS

No. COA16-606

Filed 21 February 2017

1. Wrongful Interference—tortious interference with expected inheritance—not recognized in North Carolina

The trial court did not err by dismissing plaintiff daughter's claim for tortious interference with an expected inheritance. North Carolina law does not recognize a cause of action for tortious interference with an expected inheritance by a potential beneficiary during the lifetime of the testator.

2. Fiduciary Relationship—breach of fiduciary duty—constructive fraud

The trial court did not err by dismissing plaintiff daughter's claims for breach of fiduciary duty and constructive fraud. While plaintiff's complaint alleged the existence of a fiduciary relationship between defendant son and his wife with the parties' mother, nowhere did plaintiff allege the existence or breach of a fiduciary duty owed by defendants to plaintiff.

3. Estates—request for accounting—potential beneficiary

The trial court did not err by dismissing plaintiff daughter's request for an accounting. Plaintiff failed to cite any legal authority for the proposition that her present status as a potential beneficiary of her mother's estate would entitle her to an accounting of defendant son's actions as the mother's attorney-in-fact.

Appeal by plaintiff from order entered 3 March 2016 by Judge John O. Craig, III, in Forsyth County Superior Court. Heard in the Court of Appeals 16 November 2016.

The Law Office of Michelle Vincler, by Michelle Vincler, for plaintiff-appellant.

David E. Shives, PLLC, by David E. Shives, for defendants-appellees.

DAVIS, Judge.

This appeal presents the issues of whether (1) North Carolina law recognizes a cause of action for tortious interference with an expected inheritance by a potential beneficiary during the lifetime of the testator; and (2) in cases where a living parent has grounds to bring claims for constructive fraud or breach of fiduciary duty such claims may be brought instead by a child of the parent based upon her anticipated loss of an expected inheritance. Teresa Kay Hauser ("Plaintiff") appeals from the trial court's 3 March 2016 order granting the motion to dismiss of Darrell S. Hauser and Robin E. Whitaker Hauser (collectively "Defendants") as to her claims for tortious interference with an expected inheritance, constructive fraud, and breach of fiduciary duty as well as her request for an accounting.[1] Because Plaintiff's claims for relief are not legally viable in light of the facts she has alleged, we affirm the trial court's order.

Factual and Procedural Background

We have summarized the pertinent facts below using Plaintiff's own statements from her complaint, which we treat as true in reviewing the trial court's order granting a motion to dismiss under Rule 12(b)(6). *Feltman v. City of Wilson*, 238 N.C. App. 246, 247, 767 S.E.2d 615, 617 (2014).

Plaintiff and Darrell S. Hauser ("Darrell") are the only children of Hilda Hege Hauser ("Mrs. Hauser") and her late husband, James Hauser ("Mr. Hauser"). Before his death, Mr. Hauser set up a trust (the "Trust"), naming Edward Jones Investments as trustee and listing Plaintiff, Darrell, and Mrs. Hauser as the Trust's beneficiaries. On 31 December 1998, Mrs. Hauser executed a will, devising all of her real and personal property to Plaintiff and Darrell per stirpes in the event that Mr. Hauser predeceased her. Her real property included a residence located on Harper Road in Lewisville, North Carolina (the "Harper Road Property"). The 1998 will also devised her residual estate to the trustee of the Hilda Hege Hauser Revocable Trust Agreement.

On 8 March 2005, Mrs. Hauser executed a power of attorney, naming Plaintiff as her attorney-in-fact. In late 2011, Darrell's wife, Robin Hauser ("Robin"), began caring for Mrs. Hauser. Mrs. Hauser's primary sources of income at this time consisted of payments from the Trust and

1. The trial court also dismissed Plaintiff's claim for undue influence but Plaintiff has not appealed the dismissal of that claim. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's briefs are deemed abandoned.").

her social security benefits. She also maintained checking and savings accounts with Wells Fargo.

Beginning in December 2011, as a result of the exercise of undue influence over Mrs. Hauser by Defendants, Mrs. Hauser began transferring money from the Trust to her Wells Fargo accounts and withdrawing cash from these accounts. Between 27 December 2011 and 24 April 2012, these transfers and withdrawals totaled approximately $20,000.

During March 2012, Plaintiff "was alerted to questionable transfers of funds from the Trust to [Mrs.] Hauser's Wells Fargo accounts by a trustee at Edward Jones Investments." Upon learning of these transactions, Plaintiff transferred $12,000 from Mrs. Hauser's Wells Fargo account to Plaintiff's personal account pursuant to her authority as Mrs. Hauser's attorney-in-fact.

On 12 July 2012, Mrs. Hauser revoked the 8 March 2005 power of attorney naming Plaintiff as her attorney-in-fact and executed a new power of attorney (the "2012 Power of Attorney"), appointing Darrell as her attorney-in-fact.[2] That same day, she executed a new will, which devised the Harper Road Property to Darrell and left the remainder of her real and personal property to Plaintiff and Darrell in equal shares.

On 22 January 2015, Mrs. Hauser created the Hilda Hege Hauser Irrevocable Trust (the "Irrevocable Trust"). On that same day, she signed a quitclaim deed for the Harper Road Property to Darrell and an attorney, George M. Cleland, IV, as trustees of the Irrevocable Trust.

Plaintiff filed a complaint in Forsyth County Superior Court on 17 December 2015 alleging constructive fraud, breach of fiduciary duty, tortious interference with an expected inheritance, and undue influence. In her complaint, she sought, *inter alia*, the return of any of Mrs. Hauser's funds that had been fraudulently transferred from her accounts, the removal of Darrell as Mrs. Hauser's attorney-in-fact, the revocation of Mrs. Hauser's July 2012 will, and an order requiring Darrell to "render an accounting of his actions as [Mrs.] Hauser's attorney-in-fact from July 12, 2012 to the date of the filing of th[e] Complaint."

On 12 February 2016, Defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and filed an answer twelve days later. A hearing was held on Defendants' motion

---

2. Mrs. Hauser was eighty-seven years old at the time she executed the 2012 Power of Attorney.

to dismiss before the Honorable John O. Craig, III, on 29 February 2016. On 3 March 2016, the trial court entered an order dismissing Plaintiff's complaint. Plaintiff filed a timely notice of appeal.

Analysis

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings de novo to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman, 238 N.C. App. at 251, 767 S.E.2d at 619. "Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

I. Tortious Interference with an Expected Inheritance

[1] Plaintiff's first argument on appeal is that the trial court erred in dismissing her claim for tortious interference with an expected inheritance. In support of this claim, Plaintiff alleges that Defendants' wrongful acts in causing the transfer and withdrawal of Mrs. Hauser's funds have "deplete[d] the assets of [her] eventual estate[,]" thereby diminishing Plaintiff's expected inheritance.

In her brief, Plaintiff cites several cases from North Carolina's appellate courts that she claims recognize the existence of a cause of action for tortious interference with an expected inheritance. *See, e.g.*, *Bohannon v. Wachovia Bank & Tr. Co.*, 210 N.C. 679, 685, 188 S.E. 390, 394 (1936) ("If the plaintiff can recover against the defendant for the malicious and wrongful interference with the making of a contract, we see no good reason why he cannot recover for the malicious and wrongful interference with the making of a will."). However, none of the North Carolina cases cited by Plaintiff stand for the proposition that an expected beneficiary can bring such a claim *during the lifetime of the testator*.

The legal invalidity of Plaintiff's claim is clearly demonstrated by our Supreme Court's decision in *Holt v. Holt*, 232 N.C. 497, 61 S.E.2d 448

(1950). In *Holt*, the plaintiff brought an action for fraud and undue influence against his brothers in which he asserted that they had fraudulently induced their father to convey property to them prior to his death. *Id.* at 499, 61 S.E.2d at 450. The trial court dismissed the plaintiff's action. *Id.* Our Supreme Court affirmed, holding that the plaintiff lacked standing to maintain the action until such time as the will was declared to be invalid in a caveat proceeding. *Id.* at 503, 61 S.E.2d at 453. In its opinion, the Court stated the following:

> A child possesses no interest whatever in the property of a living parent. He has a mere intangible hope of succession. His right to inherit the property of his parent does not even exist during the lifetime of the latter. Such right arises on the parent's death, and entitles the child to take as heir or distributee nothing except the undevised property left by the deceased parent.
>
> In so far as his children are concerned, a parent has an absolute right to dispose of his property by gift or otherwise as he pleases. He may make an unequal distribution of his property among his children with or without reason. These things being true, a child has no standing at law or in equity either before or after the death of his parent to attack a conveyance by the parent as being without consideration, or in deprivation of his right of inheritance.
>
> When a person is induced by fraud or undue influence to make a conveyance of his property, a cause of action arises in his favor, entitling him, at his election, either to sue to have the conveyance set aside, or to sue to recover the damages for the pecuniary injury inflicted upon him by the wrong. But no cause of action arises in such case in favor of the child of the person making the conveyance for the very simple reason that the child has no interest in the property conveyed and consequently suffers no legal wrong as a result of the conveyance.

Id. at 500-01, 61 S.E.2d at 451-52 (internal citations and quotation marks omitted).

The above-quoted principles remain the law of this State and defeat Plaintiff's claim — brought during Mrs. Hauser's lifetime — for tortious interference with an expected inheritance. All of the allegations in the complaint relate to property owned by Mrs. Hauser rather than by Plaintiff. Plaintiff filed this action solely on her own behalf rather than

in a representative capacity on behalf of Mrs. Hauser. Indeed, Plaintiff makes no allegation that Mrs. Hauser has ever been adjudicated to be incompetent.

In her brief, Plaintiff acknowledges the novelty of her claim based on existing North Carolina law but nevertheless urges us to adopt the reasoning of the Maine Supreme Court in *Harmon v. Harmon*, 404 A.2d 1020 (Me. 1979). In *Harmon*, a mother had executed a prior will under which one of her two sons — the plaintiff — would receive a one-half interest in her property upon her death, but her other son and his wife — the defendants — subsequently induced her to instead transfer all of her property to them, effectively disinheriting the plaintiff. *Id.* at 1021. While the mother was still living, the plaintiff filed suit against the defendants for wrongful interference with an intended legacy, and the trial court dismissed the claim. *Id.* at 1021-22.

The Maine Supreme Court reversed the trial court's order, holding that the Plaintiff had stated a valid claim for relief.

> We conclude that where a person can prove that, but for the tortious interference of another, he would in all likelihood have received a gift or a specific profit from a transaction, he is entitled to recover for the damages thereby done to him. We apply this rule to the case before us where allegedly the Defendant son and his wife have tortiously interfered with the Plaintiff son's expectation that under his mother's will he would receive a substantial portion of her estate.
>
> That an expectant legatee or an expectant heir has an interest of immediate economic value is implicit in the decisions holding that the expectant heir may effectively convey his interest for valuable consideration. Protection of this interest from tortious interference comports with recognition of this valuable right.

Id. at 1024-25 (internal citations omitted).

Even if we were persuaded by the reasoning in *Harmon* — which we are not[3] — this Court lacks the authority to expand the limited cause of

---

3. We note that *Harmon* has not achieved broad acceptance by courts in other jurisdictions. *See, e.g.*, *Labonte v. Giordano*, 426 Mass. 319, 322, 687 N.E.2d 1253, 1256 (1997) ("[W]e remain unpersuaded by the conclusions in the *Harmon* opinion and decline to recognize a new cause of action that [the plaintiff] seeks here.").

action recognized in *Bohannon* and its progeny in the manner requested by Plaintiff in this case. *See Johnson v. Pearce*, 148 N.C. App. 199, 202, 557 S.E.2d 189, 191 (2001) ("Only our General Assembly and Supreme Court have the authority to abrogate or modify a common law tort." (citation omitted)). Accordingly, the trial court properly dismissed this claim under Rule 12(b)(6).

II. Breach of Fiduciary Duty and Constructive Fraud

[2] Plaintiff next argues that the trial court erred in dismissing her claims for breach of fiduciary duty and constructive fraud. Defendants, conversely, contend that Plaintiff lacks standing to pursue these claims because she is not the real party in interest and no fiduciary relationship exists between Plaintiff and Defendants.

In order "[f]or a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties." *Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013) (citation and quotation marks omitted). "A fiduciary relationship may arise when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (citation and quotation marks omitted).

Similarly, in order "[t]o survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 294, 603 S.E.2d 147, 156 (2004) (citation omitted), *disc. review denied*, 359 N.C. 286, 610 S.E.2d 717 (2005). "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *Id.*

It is well established that "a lack of standing . . . may be challenged by a motion to dismiss for failure to state a claim upon which relief may be granted." *Teague v. Bayer AG*, 195 N.C. App. 18, 22, 671 S.E.2d 550, 554 (2009). It is axiomatic that "[e]very claim must be prosecuted in the name of the real party in interest." *Street v. Smart Corp.*, 157 N.C. App. 303, 306, 578 S.E.2d 695, 698 (2003) (citation and quotation marks omitted). "[F]or purposes of reviewing a 12(b)(6) motion made on the grounds that the plaintiff lacked standing, a real party in interest is a party who is benefitted or injured by the judgment in the case." *Woolard v. Davenport*, 166 N.C. App. 129, 135, 601 S.E.2d 319, 323 (2004) (citation, quotation marks, and brackets omitted).

We agree with Defendants that Plaintiff's claims for both breach of fiduciary duty and constructive fraud fail as a matter of law. While Plaintiff's complaint alleges the existence of a fiduciary relationship between Defendants and Mrs. Hauser, nowhere does she allege the existence — or breach — of a fiduciary duty owed by Defendants *to Plaintiff*. Indeed, in her brief Plaintiff concedes "that she was not in an agency relationship with either Defendant." North Carolina law simply does not permit her to proceed on these claims based solely on her theory that her "expected inheritance of [Mrs.] Hauser's assets was substantially reduced" as a result of Defendants' alleged breach of their fiduciary duty owed to Mrs. Hauser.

While Mrs. Hauser remains living, any claim arising out of a fiduciary relationship between her and Defendants can only be brought by Mrs. Hauser herself or someone legally authorized to act on her behalf. Therefore, Plaintiff lacks standing to bring a claim on her own behalf alleging that Defendants have breached a fiduciary duty owed by them to Mrs. Hauser. Absent allegations of the existence of a relationship of trust and confidence between Plaintiff and Defendants, Plaintiff's claims for constructive fraud and breach of fiduciary duty fail as a matter of law. *See Green*, 367 N.C. at 141, 749 S.E.2d at 268 (requiring existence of fiduciary relationship between the parties in order for plaintiff to succeed on breach of fiduciary duty claim); *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) ("In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a relation of trust and confidence . . . ." (citation and quotation marks omitted)).

III. Request for Accounting

[3] Finally, Plaintiff argues that the trial court erred in dismissing her request for an accounting. We disagree.

Plaintiff's complaint stated the following with regard to this claim:

> 114. Pursuant to the 2012 Power of Attorney, Plaintiff demands the Defendant Darrell S. Hauser render an accounting of his actions as [Mrs.] Hauser's attorney-in-fact from July 12, 2012 to the date of the filing of this Complaint.
>
> 115. As a beneficiary of [Mrs.] Hauser's 2012 Will and other assets, Plaintiff is entitled to an accounting of Defendant's actions while acting as [Mrs.] Hauser's attorney-in-fact to determine whether [Darrell] has

> breached his fiduciary duty and intentionally interfered with Plaintiff's expected inheritance.

Plaintiff did not attach the 2012 Power of Attorney to her complaint. Nor has she referenced in her complaint any specific provision of the 2012 Power of Attorney purporting to confer upon her the right to demand such an accounting. We are not at liberty to simply assume that such a provision may exist. *See Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 394, 537 S.E.2d 248, 252 (2000) ("While the well-pled allegations of the complaint are taken as true . . . unwarranted deductions of fact are not deemed admitted." (citation and quotation marks omitted)), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 13 (2001).

Moreover, Plaintiff has failed to cite any legal authority for the proposition that her present status as a potential beneficiary of Mrs. Hauser's estate would — without more — entitle her to an accounting of Darrell's actions as Mrs. Hauser's attorney-in-fact. Her attempt to rely upon Darrell's alleged breach of his fiduciary duty to Mrs. Hauser is, once again, insufficient to provide a basis for the relief she seeks. Therefore, the trial court correctly denied her request for an accounting.

Conclusion

For the reasons stated above, we affirm the trial court's 3 March 2016 order.

AFFIRMED.

Judges STROUD and HUNTER, JR. concur.

IN RE J.T.

[252 N.C. App. 19 (2017)]

IN THE MATTER OF J.T.

No. COA16-774

Filed 21 February 2017

Termination of Parental Rights—permanency planning hearing—failure to receive oral testimony—ceasing reunification—no findings in termination order

The trial court erred by conducting permanency planning hearings and ceasing reunification efforts without receiving any oral testimony in open court. The trial court's termination order did not include the necessary findings, and thus did not cure the defect.

Appeal by Respondent-father from orders entered 9 July 2015, 5 October 2015, and 8 April 2016 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 30 January 2017.

No brief filed for Petitioner-Appellee Orange County Department of Social Services.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

W. Michael Spivey for Respondent-Appellant father.

INMAN, Judge.

Respondent-father ("Father") appeals from orders ceasing reunification efforts and establishing a permanent plan of adoption for his son, J.T. ("Jason"),[1] and an order terminating his parental rights to Jason. Jason's mother ("Mother") is not a party to this appeal. For the reasons set forth below, we vacate the orders and remand for further proceedings consistent with this opinion.

Factual and Procedural History

Father and Mother were married in September 2009, and Mother gave birth to Jason in April 2010. Father and Mother separated in June

1. A pseudonym is used throughout the opinion to protect the identity of the juvenile and for ease of reading.

2012. In July and September 2014, Mother alleged that Father had abused Jason and Mother's oldest son, who had a different father. Following a medical examination of the children, an evaluator found that Mother had allowed the children "to be exposed to severe, chronic: physical abuse, domestic violence, substance abuse, and mood instability."

On 16 October 2014, the Orange County Department of Social Services ("DSS") filed a juvenile petition alleging that Jason was abused, neglected, and dependent. DSS obtained nonsecure custody of Jason the same day. Following a 5 March 2015 hearing, the trial court adjudicated Jason neglected and dependent by consent order on 8 April 2015. The trial court held a dispositional hearing on 7 May 2015 and entered an order on 29 May 2015 continuing Jason's custody with DSS, relieving DSS of any reunification efforts with Mother, and ordering a visitation schedule for Father and Jason.

Following an 18 June 2015 permanency planning hearing, the trial court entered an order on 9 July 2015 ceasing further reunification efforts with Father and establishing a concurrent plan of adoption and guardianship. The trial court held a second permanency planning hearing on 17 September 2015, after which the court entered an order on 5 October 2015 changing the permanent plan to adoption only and relieving DSS of further reunification efforts.

On 14 August 2015, DSS filed a motion to terminate Father's parental rights, alleging dependency as the sole ground to support termination. *See* N.C. Gen. Stat. § 7B-1111(a)(6) (2015). After a hearing on the motion, the trial court entered an order on 8 April 2016 terminating Father's parental rights after adjudicating Jason dependent. Father filed notice of appeal on 19 April 2016.

Analysis

On appeal, Father first contends that the trial court erred by conducting permanency planning hearings and ceasing reunification efforts without receiving any oral testimony in open court. We agree.

> This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law. If the trial court's findings of fact are supported by any competent evidence, they are conclusive on appeal. The trial court's conclusions of law are reviewable *de novo* on appeal.

In re P.O., 207 N.C. App. 35, 41, 698 S.E.2d 525, 530 (2010) (internal quotation marks and citations omitted).

The determinative facts of the present case are indistinguishable from those in this Court's prior decisions in *In re D.Y.*, 202 N.C. App. 140, 688 S.E.2d 91 (2010), and *In re D.L.*, 166 N.C. App. 574, 603 S.E.2d 376 (2004), in which court reports were the only admissible evidence offered by DSS at the permanency planning hearings. *See In re D.Y.*, 202 N.C. App. at 142-43, 688 S.E.2d at 93; *In re D.L.*, 166 N.C. App. at 582, 603 S.E.2d at 382. The trial court's findings of fact thus were based only on the court reports, prior orders, and the arguments of counsel. *In re D.Y.* 202 N.C. App. at 142-43, 688 S.E.2d at 93; *In re D.L.* 166 N.C. App. at 582, 603 S.E.2d at 382. In both cases, this Court held that the trial court's conclusions of law were in error without additional evidence offered to support the trial court's findings of fact, and this Court reversed the permanency planning orders. *In re D.Y.* 202 N.C. App. at 142-43, 688 S.E.2d at 93; *In re D.L.* 166 N.C. App. at 582-83; 603 S.E.2d at 382.

Here, the trial court heard no oral testimony at either the 18 June or 17 September 2015 permanency planning hearings, but only heard statements from the attorneys involved in the case. "Statements by an attorney are not considered evidence." *In re D.L.*, 166 N.C. App. at 582, 603 S.E.2d at 382. At both hearings, the trial court accepted into evidence court reports submitted by the guardian ad litem and a DSS social worker and incorporated those reports by reference in its orders. However, reports incorporated by reference in the absence of testimony are insufficient to support the trial court's findings of fact. *See id.* at 583, 603 S.E.2d at 382 ("The adoption of the DSS summary into the Order is insufficient to constitute competent evidence to support the trial court's findings of facts."). Because the trial court did not hear evidence at either of the permanency planning hearings, the findings in the court's orders were unsupported by competent evidence, and its conclusions of law were in error.

The trial court's failure to hear evidence at the permanency planning hearings does not automatically require us to vacate the orders ceasing reunification efforts. Our Supreme Court has held that incomplete findings of fact in an order ceasing reunification can be cured by findings of fact in a related termination order. *In re L.M.T.*, 367 N.C. 165, 170-71, 752 S.E.2d 453, 456-57 (2013). In this case, however, the trial court's termination order does not include findings addressing the criteria for ceasing reunification efforts. *See* N.C. Gen. Stat. §§ 7B-906.1, 906.2 (2015). As a result, the trial court's termination order does not cure the defects in the orders ceasing reunification efforts, and the orders ceasing reunification efforts must therefore be vacated. *See In re A.E.C.*, 239 N.C. App. 36, 45, 768 S.E.2d 166, 172 (vacating the trial court's termination

and permanency planning orders where "the termination order, taken together with the earlier orders, does not contain sufficient findings of fact to cure the defects in the earlier orders"), *disc. review denied*, 368 N.C. 264, 772 S.E.2d 711 (2015).

Finally, because the trial court erred in ceasing reunification efforts with respect to Father, it erred in entering its order terminating Father's parental rights to Jason. *See id.* Accordingly, we vacate the orders ceasing reunification efforts with Father and the order terminating Father's parental rights, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges CALABRIA and ZACHARY concur.

SEN LI, PLAINTIFF
v.
HENG Q. ZHOU, DEFENDANT

No. COA16-755

Filed 21 February 2017

1. Appeal and Error—interlocutory orders and appeals—failure to comply with discovery—contempt proceeding

Although as a general rule an order compelling discovery is not immediately appealable, a contempt proceeding for failure to comply with an earlier discovery order is immediately appealable.

2. Contempt—civil contempt—sufficiency of evidence

The trial court did not err in a conspiracy, fraud, and unjust enrichment case by holding defendant in civil contempt. The evidence defendant challenged as insufficient was not in the record.

3. Contempt—civil contempt—missed depositions—attorney fees and costs

The trial court did not err in a conspiracy, fraud, and unjust enrichment case by requiring defendant to pay plaintiff's legal fees and costs related to missed depositions and subsequent litigation as a condition of purging himself of contempt.

4. Judgments—default judgment—requirement to attend deposition—damages—title to property

The trial court did not abuse its discretion in a conspiracy, fraud, and unjust enrichment case by requiring defendant to appear for a deposition after entry of default against defendant. The amount of damages and the state of title to the pertinent property remained unresolved by the default judgment.

Judge DIETZ concurring.

Appeal by defendant from order entered 11 April 2016 by Judge David L. Hall in Forsyth County Superior Court. Heard in the Court of Appeals 24 January 2017.

Smith Law Group, PLLC, by Matthew L. Spencer and Steven D. Smith for Plaintiff-Appellee.

Bennett and Guthrie, P.L.L.C. by Joshua H. Bennett, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Heng Q. Zhou ("Defendant") appeals the 11 April 2016 order by Judge David L. Hall in Forsyth County Superior Court holding him in contempt of court and ordering him to pay Sen Li's ("Plaintiff") attorney's fees and costs related to his missed depositions and subsequent failure to comply with a court order. After review, we affirm the trial court's order.

I. Facts and Background

On 13 June 2014, Plaintiff filed a verified complaint alleging civil conspiracy, actual fraud, constructive fraud, and unjust enrichment against Defendant and Ping Chung ("Chung"). Li sought to recover formerly foreclosed investment property in Greensboro, North Carolina, along with actual and punitive damages. Plaintiff and Defendant purchased the property in 2003 and gave a promissory note and deed of trust to the sellers. Defendant allegedly convinced the sellers to assign the note and deed of trust to Chung without notifying Plaintiff. Plaintiff claimed this caused her to send monthly payments to the wrong party, resulting in default on the note and then foreclosure.

Chung timely filed an answer denying all allegations. Defendant, however, failed to timely respond. Plaintiff moved for entry of default

against Defendant on 20 August 2014, and the clerk filed an entry of default. Thereafter, on 15 April 2015, Plaintiff voluntarily dismissed her claims against Chung.

To establish evidence of her damages, Plaintiff noticed Defendant's deposition for 13 May 2015. In addition, Plaintiff subpoenaed Defendant for this deposition, with notice given by personal service on Defendant by the county sheriff. On 13 May 2015, Defendant appeared at the deposition. At that time, Plaintiff's counsel agreed to continue the deposition until 29 May 2015 in order to hire a Chinese interpreter.

On 14 May 2015, Plaintiff noticed Defendant's deposition for 29 May 2015. Plaintiff subpoenaed Defendant for this deposition by personal service on Defendant. Defendant failed to appear.

On 26 June 2015, Plaintiff filed a verified motion to show cause why Defendant should not be held in contempt for failure to appear at the 29 May 2015 deposition. The motion was scheduled for 10 August 2015. Defendant did not appear for the hearing, and was subsequently held in civil contempt for "failing to appear and fully testify" at the 13 May and 29 May 2015 depositions. In an order filed 11 August 2015, the court ordered Defendant to be deposed on 26 August 2015 and obtain and pay the cost of an interpreter. Finally, pursuant to Rule 37(d) of the North Carolina Rules of Civil Procedure, the court ordered Defendant to pay Plaintiff's attorney's fees of $3,176.00 and costs of $379.00 incurred in scheduling, preparing, and appearing at the two depositions. When Defendant failed to comply, Plaintiff filed a second verified motion to show cause. A show cause hearing was scheduled for the week beginning 30 November 2015.

Defendant appeared at the 30 November 2015 calendar call and indicated he did not understand English. When the judge scheduled a hearing to be held on 1 December 2015, Defendant indicated in English that he understood. At the 1 December hearing, Defendant appeared but "refused to answer questions posed by the Court."

Subsequently, on 2 December 2015, the court found Defendant willfully failed to comply with the court orders and could have taken "reasonable measures that would enable him to comply" with these orders. The court found Defendant understood English and was able to understand the proceedings. Further, Defendant "failed to show the Court any reason as to why he should not be held in contempt of Court." The trial court concluded Defendant was in civil contempt of Court and ordered him to appear for questioning in open court on 8 December 2015 with a Chinese interpreter and all costs taxed to his expense.

Defendant appeared at the 8 December 2015 hearing and was deposed through an interpreter. Unfortunately, the record does not contain a transcript of these or any other court proceedings. On 11 April 2016, the trial court issued an order regarding the 8 December 2015 hearing, making the following findings of fact:

> 10. During the defendant's deposition taken in open court on December 8, 2015 the Defendant testified that he owned 4 vans and that Defendant regularly made trips to Harrah's Casino in Cherokee, North Carolina to gamble.
>
> . . . .
>
> 12. Defendant testified that he did not testify at the May 13, 2015 deposition and appear at May 29, 2015 deposition because he was seeking medical treatments for cancer.
>
> 13. The Court allowed the defendant to provide a medical excuse or other documentation that would show good cause why he did not appear and testify at deposition as described above. The defendant provided the Court with a manila envelope containing several documents apparently printed on a medical provider's stationary, but none of which was sufficient to show good cause why the defendant did not appear and testified on the subject dates.

The trial court concluded Defendant's failure to comply with the 11 August 2015 order "appears to be willful in that he has made no payment to Plaintiff pursuant to the Order to Appear at Deposition and For Attorney's fees, and that based upon his testimony the Defendant appears to have sufficient funds and assets to do so." The court ordered Defendant to pay Plaintiff's attorney's fees and costs related to the two missed depositions, related motions, and hearings in the amount of $7,584.00. The court also ordered Defendant to pay the cost of his interpreter in the amount of $492.30. Finally, the court ordered Defendant to appear on 6 June 2016 for review to determine whether he complied with the order.

Defendant filed his notice of appeal on 11 May 2016, naming the 11 April 2016 order, and "to the extent necessary" to appeal the 11 April order, the 2 December and 11 August 2015 orders.

II. Jurisdiction

[1] "As a general rule, an order compelling discovery is not immediately appealable because it is interlocutory and does not affect a substantial

right which would be lost if the ruling is not reviewed before final judgment." *Wilson v. Wilson*, 124 N.C. App. 371, 374, 477 S.E.2d 254, 256 (1996). However:

> when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity of both the original discovery order and the contempt order itself where, as here, the contemnor can purge himself of the adjudication of contempt only by, in effect, complying with the discovery order of which he essentially complains.

Willis v. Duke Power Co., 291 N.C. 19, 30, 229 S.E.2d 191, 198 (1976). Because Defendant may only purge himself of contempt by complying with the 11 April 2016 order, appeal of all three orders named in the notice of appeal is properly before this Court.

III. Standard of Review

Defendant contends the trial court relied on incompetent evidence in its 11 April 2016 order holding him in contempt. This Court's review of a contempt order is "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Williams v. Chaney*, ___ N.C. App. ___, ___, 792 S.E.2d 207, 209 (2017). "In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978).

Defendant also asserts the trial court committed errors of law when it required him to appear for a deposition with no proper purpose, and when it required him to pay Plaintiff's legal fees and costs as a condition of purging contempt. "It is a general rule that orders regarding matters of discovery are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of discretion." *Hudson v. Hudson*, 34 N.C. App. 144, 145, 237 S.E.2d 479, 480 (1977). An error of law is by definition an abuse of discretion. *Cooter & Gell v. Hartmarx Corp*, 496 U.S 384, 405, 110 L. Ed. 2d 359, 382 (1990) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence."); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 150 (4th Cir.

2002) ("Of course, an error of law by a district court is by definition an abuse of discretion.").

IV. Analysis

A. Findings of Fact

[2] Defendant challenges the 11 April 2016 order, contending there was no competent evidence to support the findings (1) Defendant willfully disobeyed the 11 August 2015 order to appear for deposition and (2) Defendant lacked good cause for failing to appear at the missed depositions. Unfortunately, Defendant failed to order a transcript of any of the hearings in this case, including the 8 December 2015 hearing. As a result, we are unable to review the evidence Defendant contests.

North Carolina Rule of Appellate Procedure 9(a) states appellate "review is solely upon the record on appeal[.]" In compiling the record, the parties must provide

> so much of the litigation, set out in the form provided in Rule 9(c)(1), as is necessary for an understanding of all issues presented on appeal, or a statement specifying that the verbatim transcript of proceedings is being filed with the record pursuant to Rule 9(c)(2), or designating the portions of the transcript to be so filed[.]

N.C.R. App. P. 9(a)(1)(e) (2016). The burden is on the appellant to "commence settlement of the record on appeal, including providing a verbatim transcript if available." *State v. Berryman*, 360 N.C. 209, 216, 624 S.E.2d 350, 356 (2006).

The North Carolina Rules of Appellate Procedure are "mandatory and not directory." *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (internal quotation marks and citation omitted). While "every violation of the rules does not require dismissal of the appeal or the issue," *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007), dismissal for a non-jurisdictional error may be proper, depending on "whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process." *Dogwood Dev. & Mgmt. Co, LLC v. White Oak Transp. Co.*, 362 N.C. 191, 200, 657 S.E.2d 361, 366-67 (2008).

Here, Defendant designated in the record the transcript of his 8 December 2015 hearing would be filed with this Court, but failed to file the transcript as required by N.C.R. App. P. 9(c)(3)(b). Although his error is non-jurisdictional, the evidence Defendant challenges as insufficient

is not before us in the record. Consequently, we cannot review the trial court's decision and dismiss this issue.

B. Attorney's Fees and Costs

[3] Defendant argues the trial court committed reversible error when it required him to pay Plaintiff's legal fees and costs related to the missed depositions and subsequent litigation as a condition of purging himself of contempt. Defendant is mistaken.

Courts can award attorney's fees in contempt matters when specifically authorized by statute. *Blevins v. Welch*, 137 N.C. App. 98, 103, 527 S.E.2d 667, 671 (2000). The trial court based its sanctions on North Carolina Rule of Civil Procedure 37(d), which provides when a party has failed to attend a deposition, "the court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." N.C. Gen. Stat. § 1A-1, Rule 37(d) (2015). This Court has previously recognized when a party to an action fails to comply with a discovery order, attorney's fees may be awarded as a sanction for contempt under the Rules of Civil Procedure. *See First Mt. Vernon Indus. Loan Ass'n v. ProDev XXII, LLC*, 209 N.C. App. 126, 134, 703 S.E.2d 836, 841 (2011) (overturning sanctions ordered under Rule 45 for failing to respond to a subpoena because the contemnor was not a party to the action, but noting the court could have awarded attorney's fees and costs had plaintiffs moved to compel defendant under Rule 37). Consequently, we affirm the trial court's award of attorney's fees and costs to Plaintiff.

C. Proper Purpose

[4] Finally, Defendant argues the trial court erred in requiring him to appear for his deposition. He contends there was no proper purpose for a deposition after the entry of default against him. He is mistaken. Entry of default does not establish an amount of monetary damages or equitable relief. A plaintiff is entitled in advance of a hearing to inquire as to facts to establish the amount of damages in a default and inquiry hearing.

Rule 26 of the North Carolina Rules of Civil Procedure sets a broad scope for discovery, providing the "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party[.]" N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2015).

Plaintiff requested both actual and punitive damages and asked the court to impose a constructive trust to transfer title of the investment property at issue in this case back to Plaintiff. As the amount of damages and the state of title to the property remained unresolved by the default judgment, we conclude the trial court did not abuse its discretion in requiring the Defendant to appear at a deposition.

AFFIRMED.

Judge BRYANT concurs.

Judge DIETZ concurring in separate opinion.

DIETZ, Judge, concurring.

I concur in the judgment in this case but note that the record does not disclose whether the transcript of the 8 December 2015 hearing (which is designated in the record on appeal) does not exist, or whether it exists but due to inadvertence was never electronically filed in this Court. I am willing to consider rehearing the case under Rule 31, with the benefit of the missing transcript, if that transcript was requested and prepared before the Court docketed this appeal but was inadvertently omitted from the record.

STATE OF NORTH CAROLINA, PLAINTIFF
v.
NATHANIEL MALONE CHINA, DEFENDANT

No. COA16-721

Filed 21 February 2017

1. Appeal and Error—preservation of issues—failure to object

Although defendant contended that the trial court erred by admitting testimony indicating that he had spent time in prison, defendant failed to preserve this issue for appellate review or for plain error review.

2. Kidnapping—second-degree kidnapping—motion to dismiss—no additional restraint—first-degree sex offense—misdemeanor assault inflicting serious injury

The trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. There was no evidence in the record that the victim was subjected to any restraint beyond that inherent in defendant's commission of first-degree sex offense and misdemeanor assault inflicting serious injury.

Judge DILLON concurring in part and dissenting in part.

Appeal by defendant from judgments entered 5 February 2016 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 25 January 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Richard Croutharmel for defendant-appellant.

ZACHARY, Judge.

Nathaniel Malone China (defendant) appeals from judgments entered upon his convictions for felonious breaking and entering, second-degree kidnapping, first-degree sex offense, intimidating a witness, misdemeanor assault inflicting serious injury, and having attained the status of a habitual felon. On appeal, defendant argues that the trial court erred by admitting evidence that defendant committed these offenses shortly after being released from prison, and by denying defendant's

motion to dismiss the charge of second-degree kidnapping for insufficiency of the evidence. Upon careful review of defendant's arguments, in light of the record on appeal and the applicable law, we conclude that defendant has failed to preserve for appellate review the admissibility of testimony indicating that defendant had spent time in prison, and that the trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. Accordingly, we find no error in defendant's convictions for felonious breaking or entering, first-degree sex offense, intimidating a witness, misdemeanor assault inflicting serious injury, and having attained the status of a habitual felon. We vacate defendant's conviction for second-degree kidnapping and remand for correction of the judgments to reflect this.

I. Factual and Procedural Background

On 4 November 2013, the Durham County Grand Jury indicted defendant for first-degree kidnapping, felonious breaking or entering, and felonious assault inflicting serious bodily injury. The Grand Jury indicted defendant for first-degree sex offense, crime against nature, and intimidating a witness on 7 April 2014, and on 1 June 2015, defendant was indicted for being a habitual felon. On 26 January 2016, the State dismissed the indictment charging defendant with intimidating a witness and defendant agreed to proceed on that charge pursuant to a criminal bill of information. Prior to trial, the State dismissed the charge of crime against nature. The remaining charges against defendant came on for trial at the 26 January 2016 criminal session of Durham County Superior Court. Defendant did not present evidence at trial. The State's evidence tended to show, in relevant part, the following.

Nichelle Brooks and defendant began a romantic relationship in 2008. At some point before 2013, defendant was confined to prison. In 2012 or 2013, while defendant was in prison, Ms. Brooks began a romantic relationship with Mark.[1] Ms. Brooks did not visit defendant in prison; however, they sometimes talked on the phone and, during one of their phone calls, Ms. Brooks told defendant that she had a new boyfriend. In early October 2013, after defendant had been released from prison, he called Ms. Brooks and asked if they could resume their relationship. Ms. Brooks agreed to meet with defendant at her apartment to discuss their situation, in "the hope that he would just understand" her "decision in ending what we had and moving on." Shortly thereafter, defendant visited Ms. Brooks overnight at her apartment.

1. We refer to the complaining witness in this case by the pseudonym "Mark" for ease of reading and to protect his privacy.

After defendant's overnight stay, Ms. Brooks told Mark that she had previously had a relationship with defendant and asked Mark to stay away for a few days to enable Ms. Brooks to "get things in order" with defendant. Mark testified that in October 2013 he and Ms. Brooks had been dating for about a year. They did not discuss their past relationships and Mark was not aware that Ms. Brooks had been involved with defendant until she asked Mark to stay away for a few days.

On 14 October 2013, after Mark had absented himself from Ms. Brooks' apartment for several days, Ms. Brooks told Mark that things were "cordial" with defendant and that Mark could resume visiting Ms. Brooks at her home. Mark spent that night with Ms. Brooks at her apartment. On the morning of 15 October 2013, Ms. Brooks took her daughter to school and went to school at the Durham Beauty Academy, leaving Mark alone in the apartment.

Shortly after Mark awoke, he heard knocking at Ms. Brooks' door, and when he looked through a peephole in the door he saw two men whom he did not recognize. At trial, Mark identified one of the two men as defendant. Mark returned to the bedroom and hurriedly dressed for work. Mark heard banging noises and just as Mark finished dressing he heard a "boom, like the door was just kicked in." Defendant ran back to the bedroom cursing, and immediately punched Mark, who "never [had] a chance to hit him back." Defendant punched Mark "straight in the face" with his fist, and Mark fell onto the bed. Defendant "got on top of" Mark and continued punching him in the face while cursing at Mark. As a result of the beating, Mark felt "weak" and rolled over onto his face. While defendant was on the bed punching Mark in the back of the neck, he pulled Mark's pants down, spread his "anal cheek[s]" and "rammed" his erect penis into Mark's anus several times. Mark swung his arms and defendant jumped up and dragged Mark off the bed by his ankles. Defendant and his companion started "kicking and stomping" Mark, who curled up on the floor, trying to protect himself. When an opportunity arose, Mark ran out of the house and drove to his place of employment. When he arrived there, he asked for help and was taken to the hospital. As a result of the assault, Mark suffered physical injuries and emotional damage.

At the close of the State's evidence and again at the end of all the evidence, defendant moved for dismissal of the charges. The trial court agreed to submit the charge of misdemeanor assault inflicting serious injury to the jury, rather than the charge of felonious assault inflicting serious bodily injury, and denied defendant's motion with respect to the other charges. On 1 February 2016, the jury returned verdicts finding

defendant guilty of felonious breaking or entering, intimidation of a witness, second-degree kidnapping, first-degree sex offense, and misdemeanor assault inflicting serious injury. Defendant entered a plea of guilty to being a habitual felon. The trial court imposed a sentence of 150 days' imprisonment for misdemeanor assault inflicting serious injury, and consecutive prison sentences totaling 590 to 799 months for the other offenses. On 5 February 2016, the trial court conducted a resentencing proceeding, imposing the same sentences but arresting judgment on defendant's conviction for misdemeanor assault inflicting serious injury. Defendant gave notice of appeal in open court.

II. Admission of Evidence Concerning Defendant's Previous Incarceration

[1] At trial, Ms. Brooks testified that she had received phone calls from defendant while he was in a federal prison. She told the jury that she could recognize that defendant's calls were from a prison facility based on a recording that identified the call as coming from a federal prison. She identified a later call from defendant as originating from outside prison, because of the absence of this recording. On appeal, defendant argues that the trial court committed reversible error by admitting this testimony. Defendant contends that this evidence was not admissible under North Carolina Rule of Evidence 404(b), and that its admission was prejudicial to defendant.

"For us to assess defendant's challenge, however, he was required to properly preserve the issue for appeal by making a timely objection at trial." *State v. Joyner*, __ N.C. App. __, __, 777 S.E.2d 332, 335 (2015) (citing *State v. Thibodeaux*, 352 N.C. 570, 577, 532 S.E.2d 797, 803 (2000),[2] and N.C.R. App. P. 10(a)(1) (2015)). "[T]o preserve for appellate review a trial court's decision to admit testimony, 'objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence' and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *Ray*, 364 N.C. at 277, 697 S.E.2d at 322 (quoting *Thibodeaux*, 352 N.C. at 581-82, 532 S.E.2d at 806).

---

2. "Following this Court's opinion in *Thibodeaux*, the General Assembly amended N.C. Rule of Evidence 103(a) to provide that once the trial court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. . . . However, in *State v. Oglesby* this Court held that the 2003 amendment to Rule 103(a) is unconstitutional[.]. . . Therefore, we consider the statements taken from *Thibodeaux* and referenced herein an accurate statement of the current law." *State v. Ray*, 364 N.C. 272, 277 n1, 697 S.E.2d 319, 322 n1 (2010) (internal quotation and citations omitted).

Defendant asserts on appeal that this "error was preserved for appellate review by [defendant's] pretrial motion to preclude evidence of his recent release from prison and his timely objection during trial to the State's proffer of testimony concerning his recent release from prison." It is true that defendant made a pretrial motion to exclude this evidence, and that he objected during trial to the State's intention to elicit the challenged testimony from Ms. Brooks. However, defendant made no objection to Ms. Brooks' testimony in the presence of the jury regarding defendant's incarceration. For example, we note the following excerpts from the transcript:

> PROSECUTOR: How often would [defendant] call?
>
> MS. BROOKS: Not . . . not often. . . .
>
> PROSECUTOR: Where was he calling you from?
>
> MS. BROOKS: He was calling from prison.
>
> . . .
>
> PROSECUTOR: Do you remember the last time that you spoke to him on the phone when he was calling from incarceration?
>
> MS. BROOKS: I want to say the summer[.] . . .
>
> . . .
>
> PROSECUTOR: When's the next time that you did speak to [defendant]?
>
> MS. BROOKS: I spoke with him [in] October, early October.
>
> . . .
>
> PROSECUTOR: Previously when you said that he was calling from custody, how do you know that he was in custody?
>
> MS. BROOKS: The recording that you get, you know, when you receive the call, the recording.
>
> PROSECUTOR: Does it identify something?
>
> MS. BROOKS: The actual recording identifies it as a federal prison or something like that.

Defendant did not object to any of the testimony quoted above. "It is insufficient to object only to the presenting party's forecast of the

evidence." *Ray*, 364 N.C. at 277, 697 S.E.2d at 322. In the present case, "defendant objected to the admission of [the challenged] evidence . . . during a hearing out of the jury's presence . . . but did not then subsequently object when the evidence was actually introduced at trial. Thus, defendant failed to preserve for appellate review the trial court's decision to admit [this] evidence[.]" *Id.* (internal quotation omitted). "And since defendant failed to specifically and distinctly allege plain error in his brief, he waived his right to have this issue reviewed under that standard." *Joyner*, __ N.C. App. at __, 777 S.E.2d at 335 (citing N.C.R. App. P. 10(a)(4), and *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)). We conclude that defendant failed to preserve this issue for appellate review or for plain error review. Accordingly, we do not reach the merits of defendant's argument.

III. Sufficiency of the Evidence of Kidnapping

[2] Defendant argues next that the trial court erred by denying his motion to dismiss the charge against him of second-degree kidnapping. Defendant was indicted on a charge of first-degree kidnapping; however, prior to trial, the State elected to proceed on the lesser-included offense of second-degree kidnapping. On appeal, defendant asserts that there was no evidence that he restrained Mark beyond that degree of restraint that is inherent in the commission of a sexual or physical assault. After careful review of the transcript, in view of our jurisprudence on this issue, we conclude that defendant's argument has merit.

"When a defendant moves for dismissal, the trial court must determine whether the State has presented substantial evidence of each essential element of the offense charged and substantial evidence that the defendant is the perpetrator." *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "[I]f there is substantial evidence - whether direct, circumstantial, or both - to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012) (internal quotation omitted). "In considering the motion, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence, and resolving any contradictions in favor of the State." *State v. Anderson*, 181 N.C. App. 655, 659, 640 S.E.2d 797, 801 (2007) (citation omitted).

In this case, the jury was instructed that it should find defendant guilty of second-degree kidnapping if the evidence established beyond a reasonable doubt that defendant had unlawfully restrained Mark for the purpose of terrorizing him. Defendant does not dispute that this was a valid instruction on the offense of kidnapping. N.C. Gen. Stat. § 14-39(a) (2015) provides, in relevant part, that:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of [one of the following statutorily defined purposes, including] . . . [d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed[.]

"The offense of kidnapping, as it is now codified in N.C.G.S. § 14-39, did not take form until 1975, when the General Assembly . . . abandoned the traditional common law definition of kidnapping for an element-specific definition." *State v. Ripley*, 360 N.C. 333, 337, 626 S.E.2d 289, 292 (2006). However:

> In 1978, . . . [the Supreme Court of North Carolina] perceived that with this new definition came the potential for a defendant to be prosecuted twice for the same act. . . . Accordingly, this Court noted:
>
> > "It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. . . . We construe the word 'restrain,' as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony."

Id. (quoting *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978)). "To be sure, more than one criminal offense may arise out of the same criminal course of action. When, for example, the kidnapping offense is a wholly separate transaction, completed before the onset of the accompanying felony, conviction for both crimes is proper."

State v. Boyce, 361 N.C. 670, 672-73, 651 S.E.2d 879, 881 (2007) (citing *Ripley*, 360 N.C. at 337-38, 626 S.E.2d at 292).

In the present case, defendant argues that there is no evidence in the record that Mark was subjected to any restraint beyond that inherent in defendant's commission of first-degree sex offense and misdemeanor assault inflicting serious injury. We agree.

We have closely reviewed the portion of the transcript in which Mark testified about defendant's assaults upon him, as well as the statements that Mark gave to the Durham Police Department. All of the relevant evidence describes a sudden attack, in which defendant broke down the door of Ms. Brooks' apartment, ran into the bedroom where Mark was dressing, and assaulted him. Mark testified that after defendant entered the bedroom, he immediately punched Mark hard enough to throw Mark back onto the bed. Defendant continued punching Mark while he committed a brief, brutal sexual attack. After the sexual offense occurred, defendant dragged Mark off the bed by his ankles and then defendant and defendant's companion kicked Mark in the head and body.

There is no evidence in the record suggesting that Mark was "restrained" beyond the degree of restraint required to overpower Mark and assault him. For example, there is no evidence that defendant bound Mark's hands or feet, or that defendant's friend restrained Mark to facilitate defendant's assault. The entire incident took no more than a few minutes, after which Mark ran out of the apartment. We conclude that there was insufficient evidence that Mark was subjected to any restraint beyond the restraint that is inherent in defendant's commission of the assaults on Mark. Therefore, the trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. Defendant was sentenced to consecutive prison terms totaling 590 to 799 months, to be served in the following order: first-degree sex offense, second-degree kidnapping, intimidating a witness, and felonious breaking or entering. Upon remand, the trial court should vacate defendant's conviction for second-degree kidnapping and correct the judgments so that the sentence for intimidating a witness is served at the expiration of the sentence for first-degree sex offense, and the sentence for felonious breaking or entering is served at the expiration of the sentence for intimidating a witness. The resulting sentence will total 502 to 681 months, which is approximately 41 to 56 years.

IV. Conclusion

For the reasons discussed above, we conclude that defendant failed to preserve the issue of the admissibility of evidence that defendant

committed these offenses shortly after being released from prison, and that the trial court erred by denying defendant's motion to dismiss the charge of second-degree kidnapping. Accordingly, we find no error in part, vacate in part, and remand to the trial court for correction of the judgments in accordance with this opinion.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges ELMORE concurs.

Judge DILLON concurs in part and dissents in part by separate opinion.

DILLON, Judge, concurring in part and dissenting in part.

I concur with the holding in Section II of the majority opinion regarding the admission of evidence concerning Defendant's previous incarceration.

I disagree, however, with the majority's conclusion that the kidnapping conviction should be vacated. I conclude that there was sufficient evidence to sustain the jury's finding that Defendant restrained the victim *beyond* the restraint inherent to the sexual assault. Specifically, as the majority concedes, the evidence showed that *after* Defendant completed his sexual assault of the victim on the bed, he dragged the victim onto the floor. *Then*, while the victim was on the floor, Defendant restrained the victim by beating and kicking the victim, preventing the victim from getting up. Granted, this separate restraint did not last long. But this restraint which occurred while the victim was on the floor was not inherent to the sexual assault which was completed while the victim was on the bed. The restraint was a separate act. Therefore, the jury's verdict should not be disturbed.[1]

In conclusion, my vote is that Defendant received a fair trial, free from prejudicial error.

---

1. I note that the jury *also* convicted Defendant of assault, for punching and kicking the victim while the victim was on the floor. Judge Hight, though, properly arrested judgment on the assault conviction, as the conduct supporting the jury's assault conviction was the same conduct that supported the jury's kidnapping conviction.

STATE OF NORTH CAROLINA, Plaintiff
v.
MARIO DONYE GULLETTE, Defendant

No. COA16-815

Filed 21 February 2017

Appeal and Error—preservation of issues—motion to suppress identification

Although defendant argued that the trial court erred by denying his motion to suppress any identifications conducted in violation of the Eyewitness Identification Reform Act, defendant failed to preserve this issue.

Appeal by defendant from judgment entered 25 January 2016 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 February 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Susannah P. Holloway, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

ZACHARY, Judge.

Mario Donye Gullette (defendant) appeals from the judgment entered upon his conviction of trafficking in heroin and having attained the status of a habitual felon. On appeal, defendant argues that the trial court erred by denying his motion to suppress "any in-court and out-of-court identifications conducted in violation of the Eyewitness Identification Reform Act." We have carefully reviewed the record and the transcript of the proceedings in this case, and conclude that defendant did not preserve this issue for appellate review. Accordingly, we do not reach the merits of defendant's argument. Given that this is the only basis upon which defendant has challenged his convictions, we conclude that defendant had a fair trial, free of reversible error.

I. Factual and Procedural Background

On 8 April 2014, Charlotte-Mecklenburg Police Officer Charlie Davis was acting as an undercover detective who was assigned to make a purchase of heroin from a suspected drug dealer. In the course of this investigation, Officer Davis met with defendant, who sold the officer heroin

for which Officer Davis paid $600. The day after the undercover drug buy, another officer showed Officer Davis a photograph of defendant and Officer Davis confirmed that the photograph depicted the person from whom he had purchased the drugs. Officer Davis had not met defendant prior to conducting the undercover purchase. However, during the sale, Officer Davis spent several minutes in close proximity to defendant, and identified defendant in court as the man who had sold him the heroin.

On 13 October 2014, the Mecklenburg County Grand Jury indicted defendant for trafficking in heroin by selling a quantity of heroin greater than four grams but less than fourteen grams. On 27 July 2015, defendant was indicted for being a habitual felon. On 15 December 2015, defendant filed a motion to suppress "both the in-court and out-of-court identification" of defendant by Officer Davis, on the grounds that when another officer showed Officer Davis a photograph of defendant, this constituted "a 'show up' procedure seeking identification of the defendant" that was "unnecessarily suggestive" and that was conducted "in deliberate disregard of the identification procedures required by the Eyewitness Identification Reform Act."

The charges against defendant came on for trial at the 18 January 2016 criminal session of Mecklenburg County Superior Court before the Honorable Hugh B. Lewis, judge presiding. Immediately prior to trial, the trial court conducted a hearing on defendant's suppression motion. The court heard testimony from the law enforcement officers involved in the investigation that resulted in defendant's arrest. The arguments of counsel focused on whether the provisions of the Eyewitness Identification Reform Act, N.C. Gen. Stat. § 15A-284.52 (2015), applied to the facts of this case. The State argued that under the version of N.C. Gen. Stat. § 15A-284.52 in effect at the time that Officer Davis was shown a photograph of defendant, "a single photo did not constitute a lineup and did not fall under the [Eyewitness Identification Reform Act]." The prosecutor cited several cases from this Court in support of this position. The prosecutor also argued that in a subsequent amendment to the Eyewitness Identification Reform Act, under which the Act would arguably be applicable to the situation in this case, the General Assembly explicitly stated that the amended version of the statute was "effective December 1st of 2015 and applies to anything after that date."

Defendant did not dispute the accuracy of the State's characterization of the history of the Eyewitness Identification Reform Act. Instead, defendant asserted that the State was asking the trial court to "use a technicality in the statute" and asserted that he did not "believe the intent of the legislature was merely to give somebody who was in court

on November 30th, versus someone who was in court on December 1st, different treatment." Thus, defendant argued that for equitable reasons the trial court should apply the current version of the statute to this case, despite the fact that the show-up took place prior to the effective date of the amendment.

After hearing the law enforcement officers' testimony and the arguments of counsel, the trial court ruled that it was denying defendant's motion to suppress. The court found that Officer Davis was an experienced law enforcement officer who had been in defendant's presence during the sale of heroin. Regarding the applicability of the Eyewitness Identification Reform Act, the trial court stated that:

> [T]he Court concludes that the identification by Detective Davis on April 9 of 2014 was appropriate and followed the law that was enforced on that date. The Court also finds that the photo lineup act, as is presently enforced and came into force on December the 1st, 2015, was not in place or applicable law at the time of the identification by Detective Davis.

During the trial, Officer Davis testified about his undercover purchase of heroin from defendant and about the photograph of defendant that he was shown the following day. Defendant did not object when Officer Davis identified defendant as the person from whom he had bought heroin, or when the officer testified about the photograph of defendant he had been shown the following day. Nor did defendant object when the State introduced the photograph into evidence.

Following the presentation of evidence, the arguments of counsel, and the instructions from the trial court, the jury returned a verdict finding defendant guilty of trafficking in heroin. Thereafter, defendant entered a plea of guilty to having the status of a habitual felon, and the trial court imposed a sentence of 88 to 118 months' imprisonment. Defendant gave notice of appeal in open court.

II. Preservation of Alleged Error

Defendant's sole argument on appeal is that the trial court erred by denying his motion to suppress Officer Davis' identification of defendant as the person from whom he made an undercover purchase of heroin. Defendant contends that the trial court erred by ruling that the current version of N.C. Gen. Stat. § 15A-284.52 was not applicable to the instant case. The State argues on appeal that "Defendant's argument on appeal should be barred" because defendant failed to preserve the issue for

review or to argue that it constituted plain error. We agree with the State and conclude that defendant has failed to preserve this issue for our review.

N.C. R. App. P. 10(a)(1) (2015) provides in relevant part that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and that it "is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." "The law in this State is now well settled that 'a trial court's evidentiary ruling on a pretrial motion [to suppress] is not sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial.' " *State v. Hargett*, __ N.C. App. __, __, 772 S.E.2d 115, 119 (quoting *State v. Oglesby*, 361 N.C. 550, 554, 648 S.E.2d 819, 821 (2007) (citations omitted; emphasis in original)), *cert. denied*, 368 N.C. 290, 776 S.E.2d 191 (2015). "[T]o preserve for appellate review a trial court's decision to admit testimony, objections to [that] testimony must be contemporaneous with the time such testimony is offered into evidence and not made only during a hearing out of the jury's presence prior to the actual introduction of the testimony." *State v. Ray*, 364 N.C. 272, 277, 697 S.E.2d 319, 322 (2010) (internal quotation omitted).

Defendant acknowledges on appeal that he failed to object to the admission at trial of Officer Davis' testimony identifying defendant as the person who had sold heroin to him, or to the evidence concerning the photograph that Officer Davis was shown. Defendant argues, however, that the trial court's alleged error "is preserved for normal appellate review." Defendant contends that "the error here is a failure by the trial court to apply the statutory mandate expressed in N.C. Gen. Stat. § 15A-284.52" and that "[v]iolations of statutory mandates are preserved for appellate review without the need for an objection to the trial court." In support of his position, defendant cites *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985). We conclude that *Ashe* does not support defendant's argument.

In *Ashe*, our Supreme Court discussed N.C. Gen. Stat. § 15A-1233(a), which provides in relevant part that "[i]f the jury after retiring for deliberation requests a review of . . . evidence, the jurors must be conducted to the courtroom" and that the trial court "in his discretion" could allow the jury to review the requested parts of the trial testimony or to reexamine exhibits that had been admitted into evidence. *Ashe*, 314 N.C. at 33-34, 331 S.E.2d at 656. The Court held that this statute "imposes two duties upon the trial court when it receives a request from the jury to review evidence. First, the court must conduct all jurors to

the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury[.]" *Ashe* at 34, 331 S.E.2d at 656. The trial court in *Ashe* failed either to summon the jurors to the courtroom or to exercise its discretion. The State argued that the defendant had waived review of the trial court's error by failing to object at trial. Our Supreme Court held that:

> As a general rule, defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal. . . . [W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.

Ashe at 39, 331 S.E.2d at 659.

Defendant argues that, as in *Ashe*, the trial court "fail[ed] to apply [a] statutory mandate[.]" However, defendant fails to identify the "statutory mandate" to which he refers or any mandatory responsibility that the trial court neglected. In *State v. Hill*, 235 N.C. App. 166, 170, 760 S.E.2d 85, 88, *disc. review denied*, 367 N.C. 793, 766 S.E.2d 637 (2014), the defendant argued that "holding a charge conference is a statutory mandate," and this Court stated that " 'ordinarily, the word 'must' and the word 'shall,' in a statute, are deemed to indicate a legislative intent to make the provision of the statute mandatory[.]' " (quoting *State v. Inman*, 174 N.C. App. 567, 570, 621 S.E.2d 306, 309 (2005)). With this in mind, we have carefully reviewed the text of N.C. Gen. Stat. § 15A-284.52. We observe that N.C. Gen. Stat. § 15A-284.52(d) provides in both the original and the amended versions of the statute that:

> (d) Remedies. -- All of the following shall be available as consequences of compliance or noncompliance with the requirements of this section:
>
> (1) Failure to comply with any of the requirements of this section shall be considered by the court in adjudicating motions to suppress eyewitness identification.
>
> (2) Failure to comply with any of the requirements of this section shall be admissible in support of claims of eyewitness misidentification, as long as such evidence is otherwise admissible.
>
> (3) When evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider

> credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.

Given that this is the only part of the statute that refers to the trial court's responsibilities, we will assume that this section is the "statutory mandate" to which defendant refers. N.C. Gen. Stat. § 15A-284.52(d) mandates that, upon a trial court's review of the State's compliance or noncompliance with the statute: (1) the failure to comply with Eyewitness Identification Reform Act "shall be considered" by the court in adjudicating motions to suppress eyewitness identification; (2) evidence of the failure to comply with the Eyewitness Identification Reform Act, if otherwise admissible, "shall be admissible" to support claims of eyewitness misidentification; and (3) if evidence of compliance or noncompliance is offered at trial, the jury "shall be instructed" on the proper consideration of such evidence (emphasis added). These remedies appear to be mandatory and if, for example, a trial court found that the State had failed to comply with the Eyewitness Identification Reform Act in a given case, but then stated that it would not consider this fact in its determination of a defendant's suppression motion, that would be a violation of a statutory mandate.

However, the issue of a trial court's compliance with this part of the statute does not arise unless the court first reviews a party's compliance or noncompliance with the Eyewitness Identification Reform Act. In the present case, the trial court ruled that the Eyewitness Identification Reform Act did not apply to the facts of this case. The trial court did not consider evidence of compliance or noncompliance with the statute, did not make any findings or conclusions on this issue, and was not asked to admit evidence or to instruct the jury concerning the Eyewitness Identification Reform Act. Because the trial court ruled that, as a matter of law, the Eyewitness Identification Reform Act did not apply to this case, it never conducted the type of hearing on the Eyewitness Identification Reform Act that might have triggered the court's statutorily-mandated responsibilities arising from the statute. We conclude that the trial court did not violate a "statutory mandate" because the mandates of the statute arise only if a court determines that the Eyewitness Identification Reform Act *does* apply to a case and conducts the appropriate inquiry on the issue.

Defendant has not offered any other argument in support of his assertion that the trial court's alleged error was preserved for appellate review. We conclude that, by failing to object to the challenged evidence at the time it was introduced in the jury's presence, defendant has failed to preserve this issue for review. "And since defendant

failed to specifically and distinctly allege plain error in his brief, he waived his right to have this issue reviewed under that standard." *State v. Joyner*, __ N.C. App. __, __, 777 S.E.2d 332, 335 (2015) (citing N.C.R. App. P. 10(a)(4), and *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)).

We also note that defendant, who does not acknowledge his failure to preserve the alleged error for appellate review, has not asked this Court to apply N.C. R. App. P. 2 in order to reach the merits of his argument.

> Appellate Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest, or to prevent injustice which appears manifest to the Court and only in such instances. This Court's discretionary exercise to invoke Appellate Rule 2 is intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions.

State v. Biddix, __ N.C. App. __, __, 780 S.E.2d 863, 868 (2015) (internal quotations omitted). Defendant has not requested that we invoke Rule 2, and we discern no "exceptional circumstances" that would warrant its application.

For the reasons discussed above, we conclude that defendant failed to preserve for appellate review the issue of the trial court's ruling on his suppression motion. As this is the only basis upon which he has challenged his conviction, we conclude that defendant had a fair trial, free of reversible error.

NO ERROR.

Judges ELMORE and DILLON concur.

STATE OF NORTH CAROLINA
v.
TERRENCE LOWELL HYMAN, DEFENDANT

No. COA16-398

Filed 21 February 2017

1. Criminal Law—motion for appropriate relief—claim raised at first opportunity

The trial court erred when considering a motion for appropriate relief in a first-degree murder prosecution by applying a procedural bar to defendant's exculpatory witness claim. One of the statutory grounds for denial of a motion for appropriate relief is that defendant was in a position earlier to adequately raise the issue but did not. While perhaps unartfully, defendant adequately raised the exculpatory witness claim when he was first in a position to do so. That the issue was never explicitly addressed thereafter should not bar defendant's claim.

2. Criminal Law—motion for appropriate relief—findings—not germane

The conclusion that defendant's claim in a motion for appropriate relief was meritless for lack of evidentiary support was not supported by the findings, which were not germane to defendant's claim. The issue involved an exculpatory witness claim involving a prior conversation between one of defendant's counsel and a State's witness and the counsel's contemporaneous notes.

3. Constitutional Law—ineffective assistance of counsel—failure to withdraw and testify

Defendant's representation by counsel was ineffective in a first-degree murder prosecution where one of his counsel had represented a State's witness in a prior unrelated probation matter; his counsel had a conversation with the witness in an investigative capacity prior to defendant's trial, outside the scope of her prior representation of the witness; the witness's prior statement to her about the identity of the shooter was witnessed only by counsel, who made notes; and counsel did not withdraw after she became a necessary witness so that she could testify.

4. Constitutional Law—ineffective assistance of counsel—motion for appropriate relief—prejudice

Defendant made the requisite showing of prejudice in a motion for appropriate relief regarding the failure of one of his counsel to

withdraw so that she could present evidence. In a case that came down to the credibility of witnesses, there was a reasonable probability that, had counsel withdrawn and testified about the prior inconsistent statement of a State's witness, the result would have been different.

Judge DILLON dissenting.

Appeal by defendant from order entered 12 May 2015 by Judge Cy A. Grant in Bertie County Superior Court. Heard in the Court of Appeals 5 October 2016.

Attorney General Joshua H. Stein, by Assistant Attorney General Mary Carla Babb and Nicholaos G. Vlahos, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

ELMORE, Judge.

On 16 September 2003, Terrence Lowell Hyman (defendant) was convicted of first-degree murder and sentenced to life in prison without parole. After a series of post-trial motions and appeals in state and federal court, defendant filed a motion for appropriate relief in Bertie County Superior Court claiming, *inter alia*, that he was denied his right to effective assistance of counsel based upon his trial counsel's failure to withdraw and testify as a necessary witness. The trial court denied defendant's motion.

We allowed defendant's petition for writ of certiorari to review the trial court's order denying his motion for appropriate relief. Upon review, we hold the trial court erred in concluding that (1) defendant's exculpatory witness claim was procedurally barred under N.C. Gen. Stat. § 15A-1419(a); (2) defendant's exculpatory witness claim had no evidentiary support; and (3) defendant could demonstrate neither deficient performance nor prejudice which would entitle him to relief under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Reversed.

I. Background

On 30 July 2001, a Bertie County grand jury indicted defendant for the murder of Ernest Lee Bennett Jr., who was shot and killed during a brawl at a crowded nightclub. The trial court appointed Teresa Smallwood and W. Hackney High to represent defendant. He was tried

capitally at the 25 August 2003 Special Criminal Session in Bertie County Superior Court, the Honorable Cy A. Grant presiding.

At trial, the State offered testimony from two eyewitnesses, Robert Wilson and Derrick Speller, who both testified that defendant shot Bennett. Wilson testified that he saw defendant enter the nightclub with a .380 caliber handgun. A few seconds later, Wilson heard two gunshots inside and saw Bennett run out of the door. A man following Bennett hit him in the head with a bottle, knocking him out. As Bennett lay on the ground, Wilson saw defendant exit the nightclub and shoot Bennett four times.

Speller testified that defendant walked into the nightclub with a handgun and shot Bennett during the fight. Bennett ran toward the door, clenching his side as defendant continued to shoot. Speller followed out the main entrance where he saw Bennett lying on the ground. He watched defendant kneel over Bennett and shoot him again. As Speller ran toward his car, he heard more gunshots behind him. He turned and saw another man, Demetrius Jordan, shooting a nine-millimeter handgun into the air.

The State's medical examiner, Dr. Gilliland, testified that Bennett had four gunshot wounds and blunt force injuries to his scalp. Bennett was shot in the back of his head, the right side of his back, the left side of his back, and his left buttock. According to Dr. Gilliland, either of the two wounds to Bennett's back would have been fatal. A .380 caliber bullet was recovered from the wound to the right side of Bennett's back. Law enforcement found two .380 caliber casings inside the nightclub. More .380 caliber casings and bullets were recovered outside along with six nine-millimeter casings.

At the close of the State's evidence, defendant offered testimony from two witnesses, Lloyd Pugh (L. Pugh) and Demetrius Pugh (D. Pugh), who testified that defendant was not the shooter. L. Pugh, the owner of the nightclub, testified that he heard two gunshots ring out as he was trying to break up the fight. When the shots were fired, he was "looking at [defendant] telling him you all get out of here." Defendant did not have a gun. L. Pugh saw defendant and Bennett leave and heard more gunshots coming from outside. At that point or shortly thereafter, L. Pugh ran into defendant at the door as defendant was coming back inside to tend to his cousin, who had been knocked out during the fight. Defendant was still unarmed.

D. Pugh testified that he saw Demetrius Jordan shoot Bennett inside the nightclub with a .380 caliber handgun. Jordan shot Bennett again

as Bennett broke for the door and two more times outside. Jordan then retrieved a nine-millimeter handgun from his car and shot Bennett one last time before firing the remaining rounds into the air. D. Pugh never saw defendant with a gun. He testified that defendant had already left through the back door when Jordan first shot Bennett inside the nightclub.

Derrick Speller's Cross-Examination

When the State called Speller to testify at trial, Smallwood informed High for the first time that she had interviewed Speller. She previously represented Speller in an unrelated probation matter and, around that time, had spoken to him about defendant's case. During recess after Speller's direct examination, Smallwood retrieved a set of handwritten notes dictating their conversation:

> 11/20/01 Derrick Speller
>
> Saw the whole thing
>
> Demet had a .380 and a 9 mm.
>
> He shot the guy and then ran out the back door
>
> Somebody else shot at the guy with a chrome looking small gun but "I don't know who it was."
>
> "I heard Demetrius shot him again outside but I don't know for sure."
>
> "I think it was a 9 mm he (Demet) had outside.["]
>
> Never gave a statement to police because he hustled for Demet and Turnell and them niggers are lethal.
>
> Can you shoot me a couple of dollars.

Smallwood attempted to cross-examine Speller about their conversation to show that Speller had previously identified Demetrius Jordan as the shooter. Speller conceded that he spoke with Smallwood about the case before trial but denied making any of the statements reflected in her notes. He testified: "I told you at that time that I couldn't help you on this case, that I would harm [defendant] more than I could help him if I was brought on the stand to testify. That's the only conversation that you and I ever had about this case." The trial court did not allow Smallwood to show Speller her notes from the conversation or to admit the notes into evidence at trial.

First Appeal: Hyman I

After his conviction, defendant filed his first appeal with the North Carolina Court of Appeals. *State v. Hyman (Hyman I)*, No. COA04-1058,

2005 WL 1804345 (N.C. Ct. App. Aug. 2, 2005). As characterized by the Court, defendant argued that the trial court failed to conduct a hearing when it became aware of a potential conflict of interest on the part of Smallwood, who had previously represented Speller in an unrelated case. *Id.* at *4. The Court determined:

> Although the trial court was made aware of this representation, the trial court failed to conduct an inquiry and "'determine whether there exist[ed] such a conflict of interest that . . . defendant [would have been] prevented from receiving advice and assistance sufficient to afford him the quality of representation guaranteed by the [S]ixth [A]mendment.'"

Id. at *5 (citing *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 758 (1993)). Because the Court could not "find from the face of the record that defendant's attorney's prior representation of Speller affected her representation of defendant," however, it remanded "for an evidentiary hearing to determine if the actual conflict adversely affected [Smallwood's] performance." *Id.* at *6 (citation and internal quotation marks omitted).

Evidentiary Hearing on Remand

The evidentiary hearing was held on 3 October and 2 November 2005 before Judge Grant. Defendant and his trial counsel, Smallwood and High, were all present. The trial court had determined it was in defendant's best interest to have new counsel for the hearing and appointed Jack Warmack to represent him.

Warmack had previously represented Telly Swain, a co-defendant charged with Bennett's murder. The State eventually dropped the first-degree murder charge as part of a plea agreement in which Swain pleaded guilty on two lesser offenses and agreed "to testify truthfully against any co-defendant upon request by the State." On Warmack's advice, Swain also gave a written statement to police implicating defendant in the murder but Swain did not testify at trial.

Warmack expressed concern over the potential conflict of interest arising from his prior involvement in the case. He informed defendant that he had represented Swain and contacted the State Bar. Warmack ultimately determined he had no conflict of interest because he viewed his role at the remand hearing as a limited one: "I didn't think my purpose was to establish that there were—there was no conflict, but to get what [Smallwood] had to say about it on the record so the Court of Appeals could determine whether in their opinion there was a conflict or

not." If his appointment had required him to conduct his own investigation to prove that Smallwood had an actual conflict of interest, Warmack explained, then he himself would have been "conflicted out."

At the evidentiary hearing, Smallwood testified about her interaction with Speller leading up to defendant's trial. Speller had retained Smallwood's law partner, Tonza Ruffin, to represent him on a probation violation matter and at some point Smallwood stepped in for Ruffin to enter a plea on defendant's behalf. Smallwood testified that the scope of her representation in the matter lasted "maybe five or ten minutes." During that time, Smallwood did not speak to Speller about defendant's case. She insisted "there was nothing as a result of my representation of [Speller] that I would have obtained regarding [defendant]." Smallwood explained that the conversation with Speller which she alluded to at trial "took place from an investigatory standpoint" after her representation of Speller and incident to her preparation for defendant's trial.

During a recess of the hearing, Judge Grant spoke with the deputy clerk of court about the dates of Speller's probation violation matter. The records indicated that Speller was served with an order of arrest on 18 July 2002 and he appeared in court for a hearing on 26 September 2002. Ruffin was listed as the attorney of record but Smallwood had represented Speller at the hearing. Smallwood was appointed to represent defendant on 14 May 2001.

The trial court entered an order on 28 November 2005 following the evidentiary hearing. In its order, the trial court found:

> 12. That Ms. Smallwood never spoke with Derrick Speller about his case prior to September 26, 2002 and only spoke with him five or ten minutes prior to the violation hearing.
>
> 13. That Attorney Smallwood during her five to ten-minute conversation with Derrick Speller never spoke with Derrick Speller concerning any matter relating to her representation of Terrence Hyman.
>
> 14. During her five to ten-minute conversation with Derrick Speller Attorney Smallwood did not obtain any information for or about Derrick Speller that she could have used to impeach or attack Derrick Speller's credibility as a witness during the trial of the defendant Terrence Hyman.

The court ultimately concluded that Smallwood's representation of defendant was not adversely affected by her previous representation of Speller.

Second Appeal: Hyman II

Defendant appealed the order to the North Carolina Court of Appeals, arguing that the trial court erred in concluding Smallwood's prior representation of Speller did not adversely affect her representation of defendant. *State v. Hyman (Hyman II)*, No. COA06-939, 2007 WL 968753, at *3 (N.C. Ct. App. Apr. 3, 2007). The Court affirmed the order because the uncontested findings showed, *inter alia*, that there was no overlap of representation, and that during her representation of Speller, Smallwood did not obtain any information about defendant from Speller that she could have used to impeach him at trial. *Id.* at *4–5. The North Carolina Supreme Court denied defendant's petition for writ of certiorari. *State v. Hyman*, 362 N.C. 685, 671 S.E.2d 325 (2008).

Writ of Habeas Corpus in U.S. District Court

Defendant filed a petition for writ of habeas corpus in the U.S. District Court for the Eastern District of North Carolina pursuant to 28 U.S.C. § 2254. *See Hyman v. Beck*, No. 5:08-hc-02066-BO (E.D.N.C. Mar. 31, 2010). Defendant maintained that his Sixth Amendment right to effective assistance of conflict-free counsel was violated. The state court's decision to the contrary, he argued, was an objectively unreasonable application of clearly established federal law to the facts of his case.

Granting defendant's petition, the court first concluded that defendant had exhausted "his state remedies for purposes of § 2254 because the North Carolina Court of Appeals [and] the North Carolina Supreme Court were given a 'full and fair opportunity' to consider the substance of his claim." The court focused its substantive discussion on whether Smallwood had a conflict of interest in that she could have served as a material witness at defendant's trial and, in her role as counsel, her questions on cross-examination could not be considered evidence. The attorney-client privilege, the court noted, was not at issue because the lower court found that Smallwood did not obtain any information from Speller about defendant during her representation of Speller.

Guided by *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the court concluded that defendant was entitled to relief and vacated his conviction. The court explained that Smallwood "became a material witness with a conflict of interest" when Speller "testified in direct contravention to a conversation she had with him and for which she had taken contemporaneous notes." Smallwood ignored that her testimony "may have changed the outcome of trial" and chose instead "to continue as counsel in light of the need to testify herself and proffer impeaching testimony."

Because "Smallwood's actual conflict of interest adversely affected her performance," defendant was denied his Sixth Amendment right to effective assistance of conflict-free counsel and any contrary conclusion by the state courts "was an objectively unreasonable application of clearly established federal law to the facts of his case."

Appeal to the U.S. Court of Appeals for the Fourth Circuit

The State appealed the district court's order granting the writ of habeas corpus, contesting both the substance and procedural posture of defendant's Sixth Amendment claim in federal court. *Hyman v. Keller*, No. 10-6652, 2011 WL 3489092, at *8 (4th Cir. Aug. 10, 2011). The State argued that defendant "procedurally defaulted federal review" because he "did not fairly raise the exculpatory witness component in the North Carolina courts." *Id.* at *8–9. The Fourth Circuit agreed that defendant had failed to exhaust his federal claim:

> [N]either the Court of Appeals nor the Supreme Court of North Carolina has directly confronted the procedural or substantive propriety of the exculpatory witness component. Instead, the court of appeals decisions in *Hyman I* and *Hyman II* each focused on the dual representation conflict issue, and the state supreme court summarily denied Hyman's petition for certiorari.
>
> Unfortunately, the basis for the North Carolina courts' lack of attention to the exculpatory witness conflict is unclear—perhaps they did not consider that component of Hyman's Sixth Amendment claim to be fairly presented, perhaps they meant to implicitly reject it on the merits, or perhaps they simply overlooked it.

Id. at *9–10. In reaching its disposition, the Fourth Circuit explained that dismissing without prejudice "mixed" habeas petitions, i.e., those involving both exhausted and unexhausted constitutional claims, "is no longer a feasible option for a federal court, in that the § 2254 petition could ultimately be adjudged time-barred under [the Antiterrorism and Effective Death Penalty Act of 1996]." *Id.* at *10. The court decided, based on the unusual circumstances of the case, "to employ the 'stay and abeyance procedure' approved by the Supreme Court in connection with unexhausted § 2254 claims." *Id.* (citing *Rhines v. Weber*, 544 U.S. 269, 275–78 (2005)). Accordingly, the court stayed the appeal "to provide the North Carolina courts with an opportunity to weigh in on the procedural and substantive issues." *Id.* at *11.

Motion for Appropriate Relief

After the Fourth Circuit's decision, defendant filed a motion for appropriate relief (MAR) in Bertie County Superior Court. In defendant's first and principal claim, characterized by the trial court as "Claim 1," he argued that his "Sixth Amendment right to effective, conflict-free counsel was violated because one of his trial attorneys was also a crucial defense witness who did not testify due [to] her conflict as his attorney." He separated his claim further into three components, maintaining that each independently entitled him to relief: (a) "Smallwood had a conflict between her duties to her former client, the State's witness, and her duties to [defendant] ('the prior representation component')"; (b) "Smallwood had a conflict in that she was a critical witness for [defendant] but could not testify because she was his attorney ('the witness component')"; and (c) "there was a conflict between [defendant's] interest in having Smallwood withdraw and present impeachment evidence against a key State's witness and Smallwood's own financial interest in remaining on [defendant's] case ('the financial component')."

An evidentiary hearing for defendant's MAR was held on 3 June 2014 before Judge Grant in Hertford County Superior Court.[1] Defendant was present, represented by attorneys Mary Pollard and Nicholas C. Woomer-Deters, and offered testimony from W. Hackney High, defendant's trial counsel; Tonza Ruffin, Smallwood's law partner; Andrew Warmack, defendant's counsel from the evidentiary hearing; and Ravi Manne, an attorney with North Carolina Prisoner Legal Services. Despite his efforts, defendant was unable to produce Smallwood as a witness. Smallwood was disbarred almost three and a half years after defendant's trial for separate misconduct and had since left the state.

Ruffin's testimony tended to authenticate Smallwood's notes and confirm Smallwood's purported conversation with Speller. Prior to defendant's trial, Ruffin was "under the impression that [Derrick] Speller had information that would be helpful to the case." She was familiar with Smallwood's handwriting and identified the notes dated 20 November 2001 with Speller's name at the top as those written by Smallwood. She did not remember being present when the notes were written but she was present when Speller and Smallwood met in the parking lot of her law office:

1. The State and defendant had both consented to a change of venue from Bertie County to Hertford County.

> A. I remember him coming having [sic] a conversation. I remember believing that he was going to be helpful to Ms. Smallwood. But I don't remember the exact conversation.
>
> THE COURT: Do you remember anything Teresa may have said to you after he left about what he may have said?
>
> A. Yes.
>
> THE COURT: Go ahead.
>
> A. I remember him—I mean, I remember Teresa saying that he claimed that he saw everything. I remember him —I don't remember her seeking him out. I remember him seeking her out saying that basically I can help you; I was there that night; I saw everything that went down.
>
> BY MS. ASBELL:
>
> Q. And that's your memory of what Ms. Smallwood told you?
>
> A. That's my memory of what Ms. Smallwood told me and that's my memory of his attitude when he was in the parking lot that day. But I can't tell you verbatim what he said in the parking lot. But he definitely wanted to be helpful in the case.

Ruffin later testified that Speller "came over on other occasions" but she did not participate in those meetings.

During Ruffin's cross-examination, the State presented a copy of Smallwood's time sheet, which showed no entry for 20 November 2001 and no entry for an interview of Derrick Speller. (There was a 30 November 2001 entry for "file review, witness interview.") Ruffin confirmed that attorneys submit their time sheets with Indigent Defense Services (IDS) to be paid and agreed that Smallwood's entries were otherwise "very specific." But when asked if she would list "every single thing that you do" for a client, Ruffin replied, "We try to but a lot of times we don't." Later at the hearing, Manne offered his own opinion about the time sheets: "I don't know that I would view the time sheets as controlling. I know for my time keeping [ ] I don't put everything on the exact date at the same time."

High testified about his professional relationship with Smallwood and how the events involving Speller unfolded at trial. High and Smallwood had some problems when they first began working on

defendant's case. There was even an occasion when Smallwood attempted to have High removed as co-counsel but they "were able to put that aside" and work together "fairly well" from that point forward. Prior to trial, High had some indication that Speller would testify against defendant. Because Speller never provided a written statement to police, however, High did not know "specifically what [Speller] was going to say."

High and Smallwood initially agreed that High would cross-examine Speller if the State called him as a witness. High explained that they had divided the witness list in a way "that would even out the work" but if Smallwood "had a particular knowledge of a witness or what their style was she might say well it's better for me to handle this one, why don't you get the next one." That plan changed in a "spur of the moment decision" when Smallwood revealed to High that she had previously spoken to Speller. High testified:

> We do our best to anticipate the witness order that the state will call the witnesses in. But you never know for sure and so it's always a crapshoot until you actually hear the District Attorney say the next witness who will be called will be so and so.
>
> So when [Derrick] Speller's name was called as the next witness in that manner, Ms. Smallwood kind of leaned over to me and said don't worry about this one, I've got it.

High recalled Smallwood leaving court during recess and returning from her office with several documents. She told High that she had notes from a prior conversation with Speller, and she would use her notes to impeach Speller on cross-examination.

The trial court also heard arguments at the hearing on the admissibility of Smallwood's testimony had it been offered at trial. The State argued that Smallwood's testimony would not have been admissible because once Speller denied the conversation, Smallwood was "stuck" with his answer and could not introduce extrinsic evidence as to what Speller allegedly told her. And even if she had withdrawn to take the stand, the extent of her permissible testimony would have been: "[Derrick] Speller told me something different than what he testified to." Defendant, in response, argued that Smallwood's testimony would have been admissible because it went to a material fact in issue, i.e., the identity of the shooter.

After the hearing, the trial court notified the parties in writing that it would enter an order denying defendant's MAR. As the sole basis for

its denial, the court concluded that "Smallwood could not have testified about Derrick Speller's prior inconsistent statement to her, and introduced her notes or the conversation where he made that statement, after Derrick Speller denied making the statement on cross-examination." The court thereafter adopted a forty-five-page order, prepared by the State, denying all claims within defendant's MAR.

Notably, the trial court made the following findings in its order regarding the alleged conversation between Smallwood and Speller:

> 32. Defendant presented no credible evidence that the conversation which Ms. Smallwood claimed she had with Speller ever took place.
>
> 33. Defendant presented no credible evidence that Defendant's MAR Exhibit 1 contained, as he purported, notes taken contemporaneously with any conversation between Ms. Smallwood and Speller.
>
> 34. Defendant presented no credible evidence that the purported conversation between Ms. Smallwood and Speller took place on the date appearing on Defendant's MAR Exhibit 1, i.e., November 20, 2001.
>
> 35. Given the evidence presented at the MAR evidentiary hearing, the Court cannot definitely find based only upon Defendant's MAR Exhibit 1 and Ms. Smallwood's cross-examination of Speller at Defendant's trial that Ms. Smallwood wrote the notes admitted as Defendant's MAR Exhibit 1 contemporaneously with any conversation she had with Speller; that the purported conversation took place on the date appearing on the exhibit, i.e., November 20, 2001; or that the conversation ever took place.

Although the court recognized the significance of Ruffin's testimony at the hearing, evidence that Smallwood's time sheet contained no entry for 20 November 2001 and that High did not learn about the conversation until trial both indicated to the court that the conversation never took place.

Regarding defendant's Claim 1(b) (the "exculpatory witness claim"), the trial court concluded that defendant's claim was procedurally barred under N.C. Gen. Stat. § 15A-1419(a) and, alternatively, without merit. Applying the standard set forth in *Strickland*, 466 U.S. at 687, the court concluded that defendant could demonstrate neither deficient performance nor prejudice based upon Smallwood's failure to withdraw and

testify as a witness. And to the extent *Sullivan*, 446 U.S. at 350, applied to defendant's exculpatory witness claim, the court concluded that the claim was still meritless because he "failed to present evidence establishing that any actual conflict of interest existed which had an adverse effect on Ms. Smallwood's representation of defendant."

Defendant filed a petition for writ of certiorari, which we allowed, seeking review of the trial court's order denying his MAR. Defendant contends that (1) he was not procedurally barred from raising the exculpatory witness claim and, alternatively, any failure to properly assert the claim in *Hyman I* was due to ineffective assistance of appellate counsel; (2) he was not procedurally barred from raising the dual representation claim and, alternatively, any failure to properly assert the claim in *Hyman II* was due to ineffective assistance of counsel owing to Warmack's conflict of interest; (3) the trial court's material factual findings were entered pursuant to an incorrect evidentiary standard and are not supported by the evidence; and (4) defendant was denied his right to effective assistance of counsel and is entitled to relief under *Sullivan* or, alternatively, under *Strickland*.

II. Discussion

We review the trial court's rulings on motions for appropriate relief "to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Steven*s, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). The trial court's findings of fact "are binding on appeal if they are supported by competent evidence." *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999). The trial court's conclusions of law, however, " 'are fully reviewable on appeal.' " *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

A.

[1] We first address whether the trial court erred in applying a procedural bar to defendant's exculpatory witness claim.

N.C. Gen. Stat. § 15A-1419(a) (2015) provides four grounds for the denial of a motion for appropriate relief, including: "Upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C. Gen. Stat. § 15A-1419(a)(3). Where such grounds exist, the trial court must deny

the motion unless the defendant can show (1) "good cause for excusing the grounds for denial" and "actual prejudice resulting from the defendant's claim"; or that (2) the "failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C. Gen. Stat. § 15A-1419(b) (2015).

The statute clarifies that "good cause" exists only where "the defendant establishes by a preponderance of the evidence that his failure to raise the claim or file a timely motion was," among other reasons, due to "ineffective assistance of trial or appellate counsel." N.C. Gen. Stat. § 15A-1419(c)(1) (2015). And to demonstrate "actual prejudice," the defendant must show "by a preponderance of the evidence that an error during the trial or sentencing worked to the defendant's actual and substantial disadvantage, raising a reasonable probability, viewing the record as a whole, that a different result would have occurred but for the error." N.C. Gen. Stat. § 15A-1419(d) (2015). Finally, the trial court's failure to consider the otherwise barred claim results in "a fundamental miscarriage of justice" only if "[t]he defendant establishes that more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense." N.C. Gen. Stat. § 15A-1419(e)(1) (2015).

The trial court concluded that defendant's claim was procedurally barred under N.C. Gen. Stat. § 15A-1419(a)(3). In the record on appeal in *Hyman I*, defendant included the following assignment of error:

> 10. Defendant was denied the assistance of counsel because his attorney failed to withdraw from representation when it became apparent that she had a conflict of interest.

The trial court viewed defendant's tenth assignment of error as "a clear indication that defendant contemplated arguing an ineffective assistance of counsel claim based upon Ms. Smallwood's failure to withdraw and testify." In his appellate brief, however, defendant "did not identify what he is now squarely raising in Claim 1(b) as a ground for reversal on appeal." While "defendant made references in the body of his brief to Ms. Smallwood's failure to withdraw and testify," he did so under the following assignment of error: "The trial court erred in failing to conduct a hearing when the court became aware of a conflict of interest on the part of one of defendant's attorneys who had previously represented Derrick Speller, one of the State's witnesses." The trial court concluded, therefore, that defendant's claim was procedurally barred because he was in a position to adequately raise his claim in *Hyman I* but failed

to do so. The court further concluded that because defendant's claim was meritless, "the procedural bar has not been excused pursuant to N.C.G.S. § 15A-1419(b) by showing good cause and actual prejudice, or that a fundamental miscarriage of justice would occur for this Court's failure to review the barred claim."

An examination of defendant's "references" to the exculpatory witness claim within his first appellate brief, alluded to by the trial court, reveals the extent to which defendant attempted to raise the claim on appeal in *Hyman I*:

> Defense counsel Smallwood had a conflict of interest in that she was in possession of information which could be used to impeach Derrick Speller, one of the State's most crucial witnesses. This information consisted of statements he made to her implicating Demetrius Jordan and exonerating Defendant, which directly contradicted his testimony at trial. Although she chose to remain as counsel and used the information she acquired in her representation of Speller to impeach his testimony, rather than withdrawing as counsel and testifying as a witness, it is not at all clear that this was the correct decision. It is certainly arguable that the information she had to impart would have carried more weight had she been on the stand testifying under oath. Nor is it clear that Defendant was aware of the conflict and had acquiesced in counsel's actions.

Reviewing defendant's brief with the benefit of hindsight, it would have been more helpful had defendant argued his claim pursuant to the tenth assignment of error. Nevertheless, the foregoing excerpt from his brief and a fair reading of the cases cited for support therein, *see, e.g.*, *State v. Green*, 129 N.C. App. 539, 551–52, 500 S.E.2d 452, 459–60 (1998) (holding that trial court properly conducted an inquiry into conflict of interest owing to counsel's decision not to pursue line of questioning which could have required counsel himself to withdraw and testify), indicates that the Court could have addressed the claim as it was presented despite the formerly rigid rule of appellate procedure requiring assignments of error. While perhaps unartfully, defendant adequately raised the exculpatory witness claim when he was first in a position to do so. That the issue was never explicitly addressed thereafter—for whatever reason—should not bar defendant's claim under N.C. Gen. Stat. § 15A-1419(a), and the trial court erred in concluding otherwise.

B.

[2] Next, we address defendant's challenge to the trial court's material factual findings regarding the conversation between Smallwood and Speller.

The trial court found that defendant offered no credible evidence at the MAR hearing that Smallwood transcribed the handwritten notes contemporaneously with any conversation she had with Speller, that the purported conversation took place on 20 November 2001, or that the conversation ever took place. Based solely upon Smallwood's notes and her cross-examination of Speller at trial, the court also could not "definitely find" any of the foregoing had occurred, implying that Smallwood fabricated the evidence at trial. Relying on these findings, the court concluded that there was no evidence to support defendant's exculpatory witness claim.

At an evidentiary hearing on a motion for appropriate relief, "the moving party has the burden of proving *by a preponderance of the evidence* every fact essential to support the motion." N.C. Gen. Stat. § 15A-1420(c)(5) (2015) (emphasis added). As defendant points out, therefore, he was not required to "definitely" prove that Smallwood transcribed the handwritten notes contemporaneously with any conversation she had with Speller, that the purported conversation took place on 20 November 2001, or that the conversation ever took place. More importantly, that the court was unable to "definitely find" any of the foregoing occurred is not dispositive of defendant's exculpatory witness claim.

It is undisputed that, at the time of defendant's trial, Smallwood possessed evidence tending to show that Speller made a prior inconsistent statement concerning the identity of the shooter. The exculpatory witness claim raised in defendant's MAR was whether Smallwood's failure to withdraw and testify as to that alleged prior inconsistent statement constitutes ineffective assistance of counsel. Evidence that Smallwood was privy to a conversation in which Speller identified the shooter as someone other than defendant would have been both relevant and material had it been offered at trial. Admissibility is, of course, a separate issue but one that does not depend upon a preliminary finding by the court that a witness's testimony is credible. *See* N.C. Gen. Stat. § 8C-1, Rule 104(e) (2015) ("This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.").

If otherwise competent, therefore, Smallwood's testimony would have been admissible and within the purview of the jury to assign weight

and credibility thereto. *See State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) ("The credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury." (citing *State v. Wilson*, 293 N.C. 47, 235 S.E.2d 219 (1977))); *State v. Gamble*, ___ N.C. App. ____, ____, 777 S.E.2d 158, 165 (Oct. 6 2015) (No. COA15-71) ("The witness's credibility is a matter for the court when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with [the proponent's] own evidence." (citations and internal quotation marks omitted)). The jury could have believed Smallwood's testimony, in which case her failure to withdraw and testify would tend to support defendant's claim for ineffective assistance of counsel. Because the trial court's findings were not germane to the adjudication of defendant's exculpatory witness claim, they do not support its conclusion that defendant's claim is meritless for lack of evidentiary support.

C.

[3] Next, we address the substance of defendant's exculpatory witness claim and his challenge to the trial court's conclusions that he received effective assistance of counsel despite Smallwood's failure to withdraw and testify at trial.

Defendant maintains that he received ineffective assistance of counsel due to Smallwood's failure to withdraw as counsel and testify as to Speller's alleged prior inconsistent statement regarding the identity of the shooter. In her role as counsel, Smallwood's questions on cross-examination could not be considered evidence by the jury. Therefore, defendant argues, when Speller denied the prior inconsistent statement during cross-examination, Smallwood had an actual conflict of interest between continuing as counsel or withdrawing to testify as a necessary witness. Defendant contends that because Smallwood's actual conflict of interest adversely affected her performance as counsel, he is entitled to relief under *Sullivan*, 446 U.S. at 348. Alternatively, defendant claims he is entitled to relief under *Strickland*, 466 U.S. at 687, because Smallwood's decision to remain as counsel fell below an objective standard of reasonableness and prejudiced his defense.

A criminal defendant's Sixth Amendment right to counsel means "the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). Effective assistance of counsel includes a "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (citations omitted). In counsel's role, he or she owes the client a duty of loyalty, which is "perhaps the most basic of counsel's duties." *Strickland*, 466 U.S. at 688, 692.

To prevail on a claim of ineffective assistance of counsel, a defendant typically must show that "counsel's performance was deficient" and "the deficient performance prejudiced the defense." *Id.* at 687; *see also State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) (adopting the standard set forth in *Strickland* to review claims of ineffective assistance of counsel under the North Carolina Constitution). The U.S. Supreme Court has applied a different standard, however, to review claims of ineffective assistance of counsel based upon a conflict of interest. *Sullivan*, 446 U.S. at 349–50. Under *Sullivan*, a defendant who "shows that his counsel actively represented conflicting interests" and that "conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id.*; *see also Mickens v. Taylor*, 535 U.S. 162, 172–73 (2002); *State v. Choudhry*, 365 N.C. 215, 219, 717 S.E.2d 348, 352 (2011). A presumption of prejudice arises because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692.

The North Carolina Supreme Court has previously addressed whether an attorney's decision not to withdraw and testify as a witness for his client created an actual conflict of interest reviewable under *Sullivan* rather than *Strickland*. In *State v. Phillips*, 365 N.C. 103, 711 S.E.2d 122 (2011), the defendant moved to suppress evidence of his confession because "he was substantially impaired from drugs and alcohol and unable to understand the consequences of his actions when he waived his *Miranda* rights." *Id.* at 109–11, 711 S.E.2d at 130–31. The police chief, Gary McDonald, had apparently told the defendant's attorney, Bruce Cunningham, that the defendant was "stoned out of his mind" when he confessed to shooting four people. *Id.* at 115, 117, 711 S.E.2d at 133, 134. When Cunningham confronted Chief McDonald about the alleged statement on cross-examination and presented handwritten notes of the conversation, Chief McDonald testified that he did not recall making the statement. *Id.* at 117–18, 711 S.E.2d at 134–35.

The defendant appealed his conviction, arguing that he was deprived of his Sixth Amendment right to conflict-free counsel because Cunningham "failed to withdraw and testify as a witness for defendant, depriving him of conflict-free counsel." *Id.* at 116–17, 711 S.E.2d at 134. He claimed that "a withdrawal was necessary because attorney Cunningham remembered Chief McDonald making certain statements to Cunningham that Chief McDonald did not himself recall." And because Cunningham could not serve as both an advocate and a necessary

witness at trial, *see* N.C. St. B. Rev. R. Prof. Conduct 3.7 ("Lawyer as a Witness"), 2017 Ann. R. N.C. 1242, Cunningham had an "actual conflict of interest" which entitled the defendant to relief under *Sullivan*. *Id.* at 117–18, 711 S.E.2d at 135. Our Supreme Court concluded, however, that the defendant's claim should be reviewed under *Strickland*:

> The applicability of the *Sullivan* line of cases has been carefully cabined by the United States Supreme Court. "The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." Here, unlike the circumstances posited in *Holloway* where counsel has been effectively silenced and any resulting harm difficult to measure, defendant has identified the single matter to which attorney Cunningham could have testified had he withdrawn as counsel. Because the facts do not make it impractical to determine whether defendant suffered prejudice, we conclude that *Strickland*'s framework is adequate to analyze defendant's issue.

Id. at 121–22, 711 S.E.2d at 137 (quoting *Mickens*, 535 U.S. at 176).

Guided if not bound by *Phillips*, we believe *Strickland* provides an adequate framework to review defendant's exculpatory witness claim. Despite Smallwood's prior representation of Speller, the record shows that the purported conversation between Smallwood and Speller "took place from an investigatory standpoint" in preparation for defendant's trial. Because that conversation was outside the scope of her representation, Smallwood would not have bound by a duty of confidentiality. By the same token, Smallwood was not "effectively silenced" from testifying about the conversation and the information she learned from Speller. As the facts of this case do not "make it impractical to determine whether defendant suffered prejudice," *Phillips*, 365 N.C. at 122, 711 S.E.2d at 137, we apply *Strickland*'s framework to evaluate defendant's exculpatory witness claim.

As stated above, *Strickland* requires a defendant to first show that "counsel's performance was deficient." *Strickland*, 466 U.S. at 687. To establish deficient performance, the defendant "must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.' " *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*,

466 U.S. at 688); *see also State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286, *cert. denied*, 549 U.S. 867 (2006).

The trial court concluded that defendant could not demonstrate deficient performance because Smallwood's testimony would not have been admissible at trial. And even if it would have been admissible, the court concluded, Smallwood could only have testified that "Demet had a .380" and "[h]e shot the guy and ran out the back door." We disagree.

Our common law rules have restricted the use of extrinsic evidence to impeach the credibility of a witness. As articulated in *State v. Stokes*, 357 N.C. 220, 581 S.E.2d 51 (2003), a case decided prior to defendant's murder trial, "when a witness is confronted with prior statements that are inconsistent with the witness' testimony, the witness' answers are final as to collateral matters, but where the inconsistencies are material to the issue at hand in the trial, the witness' testimony may be contradicted by other testimony." *Id.* at 226, 581 S.E.2d at 55 (citing *State v. Green*, 296 N.C. 183, 192–93, 250 S.E.2d 197, 203 (1978)); *see also* 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* §§ 159–61 (7th ed. 2011). If the prior inconsistent statement relates to a material matter, then it "may be proved by other witnesses without first calling [it] to the attention of the main witness on cross-examination." *Green*, 296 N.C. at 193, 250 S.E.2d at 203 (citations omitted). If it is collateral but tends to show bias, motive, or interest of the witness, the inquirer must first confront the witness with the "prior statement so that he may have an opportunity to admit, deny or explain it." *Id.*; *see also State v. Long*, 280 N.C. 633, 639, 187 S.E.2d 47, 50 (1972). If the witness denies making the statement, "the inquirer is not bound by the witness's answer and may prove the matter by other witnesses." *Green*, 296 N.C. at 193, 250 S.E.2d at 203.

It cannot seriously be disputed that the identity of the shooter was a material issue in defendant's murder trial. Smallwood, who possessed evidence of Speller's prior inconsistent statement regarding the shooter's identity, was not bound to accept Speller's answers on cross-examination. Smallwood's testimony, had it been offered, would have been admissible to impeach Speller by showing that he had previously identified Jordan as the shooter. And contrary to the trial court's conclusion, we do not believe such exculpatory evidence would have been inconsequential so as to justify Smallwood's failure to withdraw.

Smallwood's testimony would have also been admissible to show Speller's bias or interest in the trial. Jordan was initially charged with Bennett's murder and spent two years in jail before he was released.

Speller testified that he and Jordan "work[ed] the same job." After the charges against Jordan were dropped, he sent Speller to the district attorney to offer a statement implicating defendant in the murder. The trial court even expressed concern over this aspect of the case during the charge conference:

> I think Mr. Jordan's credibility is at issue in this case . . . . At least one of your witnesses—one of your very key witnesses . . . Derrick Speller testified that he came to you as a result of what Demetrius Jordan said to him, if I'm not mistaken. Demetrius Jordan told him to go see you. Had it not been for that he may not even have been involved in the case. So the question is, why is Demetrius Jordan running around rounding up witnesses for the State.
>
> At the same time . . . you have a situation where the State of North Carolina has dismissed very serious cases against Mr. Jordan—a case of second-degree murder—and allowed him to plea to something much less to the point where he is now out of jail . . . .

Speller testified at trial that he never gave a statement to police because "nobody never asked me." That explanation was different than what Smallwood had dictated in her notes: "[Speller] never gave a statement to the police because he hustled for Demet and Turnell and them niggers are lethal."

While the admissibility of Smallwood's testimony does not in and of itself establish deficient performance, the circumstances surrounding her decision to remain as counsel leads us to that conclusion. Smallwood was the only witness to Speller's prior inconsistent statement. Her questions to Speller could not be considered as evidence and, after her ineffective cross-examination, she became a necessary witness at trial with a duty to withdraw. *See* N.C. St. B. Rev. R. Prof. Conduct 3.7(a) ("A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness . . . ."), 2017 Ann. R. N.C. 1242. Her testimony undoubtedly related to a contested issue in the case and tended to discredit one of the State's two key witnesses. High could have remained as defendant's counsel and the court could have appointed a second attorney even if it meant declaring a mistrial. By failing to withdraw and testify, Smallwood's conduct fell below an objective standard of reasonableness and was deficient under *Strickland*.

[4] Next, we address whether defendant satisfied the requisite showing of prejudice for relief under *Strickland*. To show prejudice, a "defendant

must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The trial court concluded that defendant could not establish prejudice in light of Smallwood's "effective cross-examination" of Speller, Wilson's testimony, and the State's cross-examination of D. Pugh based upon his prior inconsistent statement to law enforcement. We disagree.

If Smallwood had properly withdrawn, she could have testified that Speller, one of only two key witnesses for the State, had previously told her that it was Jordan—not defendant—who shot Bennett. She could have attacked Speller's credibility through his prior inconsistent statement and evidence of his interest in the trial. Her testimony tended to discredit nearly half the State's case and, in conjunction with the testimony of L. Pugh and D. Pugh, would have provided an evidentiary advantage to the defense.

Wilson, the only other witness to identity defendant as the shooter, had his own credibility issues. He had testified as a State's witness in the past and, during defendant's trial, revealed that he had been convicted of breaking and entering, two counts of second-degree burglary, larceny of a firearm, larceny of a motor vehicle, four counts of driving while license revoked, four counts of driving while impaired, two counts of injury to property, communicating threats, assault with a deadly weapon, and forgery and uttering—*all within the last ten years*. Judge Grant even remarked at the MAR hearing: "We all know Robert Wilson. . . . And a record like that, right, we know him."

The State's cross-examination of D. Pugh also does not foreclose a showing of prejudice. D. Pugh denied making a prior inconsistent statement to police, asserting that when he was arrested days after the murder on unrelated charges, police gave him a blank sheet of paper to sign and initial, which he did, and they later wrote out a statement implicating defendant. The statement was not introduced at trial, and despite the State's cross-examination, D. Pugh's testimony implicating Jordan as the shooter would nevertheless have bolstered Smallwood's impeachment evidence against Speller.

Finally, we agree with defendant that, as a practical matter, Smallwood's testimony could have rehabilitated her own credibility as an advocate at trial, which has been described as "[a] cardinal tenet of successful advocacy." *State v. Moorman*, 320 N.C. 387, 400, 358 S.E.2d 502, 510 (1987). Even from a cold record we can tell that Smallwood's

cross-examination was, in defendant's own words, "disastrous." Speller denied her every attempt to establish that he had given a prior inconsistent statement or that their conversation took place. His steadfast repudiation bolstered his own credibility and impeached Smallwood's credibility as an advocate. In a case that came down to the credibility of the witnesses, there is a reasonable probability that, had Smallwood withdrawn and testified as to Speller's prior inconsistent statement, the result would have been different.

III. Conclusion

We conclude that defendant was denied his right to effective assistance of counsel based upon Smallwood's failure to withdraw and testify as a necessary witness at trial. Because defendant is entitled to relief under Strickland on his exculpatory witness claim, we need not address his remaining arguments to this Court. The trial court's order denying his MAR is reversed.

REVERSED.

Judge HUNTER, JR. concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

My vote is to affirm Judge Grant's order denying Defendant's motion for appropriate relief ("MAR"). Therefore, I respectfully dissent.

Defendant was charged with the murder of Ernest Bennett, who was shot and killed at a nightclub. At Defendant's trial, the State's evidence included the testimony of two eyewitnesses, both of whom stated that they saw Defendant shoot the victim. Defendant's evidence included the testimony of an eyewitness who stated that he saw *another* man, Demetrius Jordan, shoot the victim. The jury found Defendant guilty, and Defendant's conviction was upheld by this Court in a prior appeal.

More recently, Defendant filed an MAR for a new trial. Defendant's MAR was denied by the trial court, and Defendant appealed.

Defendant's arguments at his MAR hearing and on appeal concern an alleged conversation that one of Defendant's attorneys, Teresa Smallwood, had with one of the State's witnesses prior to trial. On direct, after the State witness testified that he saw Defendant shoot the victim, he further testified that he had spoken with Ms. Smallwood about the

shooting prior to the trial. Ms. Smallwood cross-examined the State witness about the prior conversation, suggesting during her questioning that the State witness had told her that he had seen Demetrius Jordan, and not Defendant, shoot the victim. Ms. Smallwood also attempted to show the State witness her "notes" from their alleged conversation; however, the trial court did not allow her to do so. Throughout Ms. Smallwood's cross-examination, the State witness remained steadfast in his testimony that he saw Defendant kill the victim.

Defendant essentially argues two points in this MAR phase. First, he makes an "exculpatory witness claim," contending that Ms. Smallwood should have withdrawn and then offered testimony to impeach the testimony of the State witness. Second, he makes an ineffective assistance of counsel ("IAC") claim, contending that Ms. Smallwood should have withdrawn and testified and that his appellate attorney failed to argue this point in the first appeal.

I. Exculpatory Witness Claim

The State contends that Defendant's exculpatory witness claim is procedurally barred because the claim could have been raised in Defendant's prior appeal. The majority concludes that Defendant *did* raise this claim, though inartfully, in his appellate brief in the prior appeal. However, our Court apparently did not recognize that the claim was being argued in the prior appeal, as our Court did not address the claim in its opinion.

My view is that Defendant's exculpatory witness claim is barred in either case. That is, if Defendant's "inartful" brief *failed* to make an exculpatory witness claim, then Defendant is procedurally barred because he could have raised it. Alternatively, if Defendant's brief *did* raise an exculpatory witness claim, Defendant is still procedurally barred because he failed to raise it through a petition for rehearing to this Court following the issuance of our prior opinion, which ostensibly ignored his claim. Our Appellate Rule 31 provides that a party may file a petition for rehearing after an opinion to argue "the points of fact or law that, in the opinion of the petitioner, the [Court of Appeals] overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present." N.C. R. App. P. 31. However, Defendant did not petition this Court for rehearing to consider his exculpatory witness claim that he now contends we overlooked.

Defendant argues that he was still entitled to have his exculpatory witness claim reviewed in an MAR hearing, notwithstanding that he could have raised it in the prior appeal. Specifically, he contends that

the trial court's failure to review his claim resulted in a fundamental miscarriage of justice. We disagree.

Here, Defendant has failed to establish that "more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense[.]" N.C. Gen. Stat. § 15A-1419(e)(1). As discussed more fully in the IAC section below, Defendant did not present evidence to show exactly what Ms. Smallwood would have said had she taken the stand. Even if she had testified that she remembered the State witnesss informing her that he did not see Defendant shoot the victim, I believe that it still would not have been unreasonable for the jury to convict. The jury could have lent very little weight to Ms. Smallwood's testimony; *see Ward v. Carmona*, 368 N.C. 35, 37, 770 S.E.2d 70, 72 (2015) ("The function of the jury is to weigh the evidence and determine the credibility of any witnesses."); for instance, her timesheets do not reflect that she had any interaction with the State witness on the day that her "notes" indicate that she met with him. In addition, the testimony of the State witness was corroborated by the testimony of another eyewitness.

II. Ineffective Assistance of Counsel Claim

I do not believe that the trial court erred in its conclusion regarding Defendant's IAC claims. Defendant failed to present evidence at the MAR hearing to show a reasonable probability that a different result would have occurred had Ms. Smallwood withdrawn and then attempted to testify *or* had his appellate counsel filed a petition for rehearing with this Court to consider his exculpatory witness claim.

To establish reasonable probability, it was Defendant's burden at the MAR hearing to show exactly what the substance of Ms. Smallwood's testimony would have been. Otherwise, it is impossible on review to determine whether Ms. Smallwood's testimony would have been admissible and what impact it might have had. But as Judge Grant points out in his Order, Defendant did not present Ms. Smallwood as a witness at the MAR hearing. No one else testified at the MAR hearing with any detail as to what Ms. Smallwood would have stated had she been allowed to take the stand. There is no competent evidence in the record to demonstrate that Ms. Smallwood had *any* independent recollection that the State witness told her that he saw someone other than Defendant kill the victim *or* whether her "notes" from the alleged conversation would have refreshed her memory. It may be that Ms. Smallwood would have offered admissible, persuasive testimony to impeach the State witness.

However, Defendant simply failed to meet his burden of proof to show as much at the MAR hearing.

At the MAR hearing, Defendant did offer a copy of the "notes" which Ms. Smallwood attempted to show the State witness at trial. However, these notes are not admissible to show how Ms. Smallwood might have testified. The notes do not suggest that the State witness told Ms. Smallwood that he saw Demetrius Jordan fire the fatal shot. Rather, the notes suggest, at best, that the State witness told Ms. Smallwood that he did not see who fired the fatal shot, after Demetrius Jordan had fled the scene.[2]

I conclude that Judge Grant's conclusions are supported by his findings. Accordingly, my vote is to affirm the trial court's order.

2. The State stresses that Judge Grant found that Defendant, at the MAR hearing, failed to produce any credible evidence that the alleged conversation between Ms. Smallwood and the State witness ever took place. However, I do not view as relevant whether Judge Grant believed the conversation took place. Rather, what is relevant is how Ms. Smallwood *would have testified* concerning the alleged conversation, leaving it *to the jury* to make any credibility determination regarding what, if anything, the State witness told Ms. Smallwood prior to trial.

TOWN OF BELVILLE, PLAINTIFF
v.
URBAN SMART GROWTH, LLC, AND MICHAEL WHITE, DEFENDANTS

No. COA16-817

Filed 21 February 2017

Arbitration and Mediation—arbitration—belatedly demanded —waiver

The trial court did not err by concluding that plaintiff had waived its right to compel arbitration where defendant had expended significant resources to prepare for litigation before plaintiff belatedly demanded arbitration.

Appeal by plaintiff from order entered 13 April 2016 by Judge Gary E. Trawick in Brunswick County Superior Court. Heard in the Court of Appeals 26 January 2017.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Andrew L. Rodenbough and Charles S. Baldwin, IV, and Eldridge Law Firm, PC, by James E. Eldridge, for plaintiff-appellant.

Hamlet & Associates, PLLC, by H. Mark Hamlet, for defendant-appellee.

BERGER, Judge.

The Town of Belville ("Plaintiff") appeals the April 13, 2016 order entered by the Honorable Gary Trawick in Brunswick County Superior Court. The order denied Plaintiff's motion to compel Urban Smart Growth, LLC ("Defendant") to submit to binding arbitration and to stay all other proceedings in the dispute between these parties. Plaintiff argues in this interlocutory appeal that it has the contractual right to demand arbitration. However, after careful review, we affirm the trial court's order denying this motion because Plaintiff took actions contrary to its contractual rights and waived any right to arbitration.

Factual & Procedural Background

In October 2007, Plaintiff entered into an agreement ("Agreement") with Defendant concerning a revitalization project in the town of Belville, North Carolina. The project would include a "large-scale mixed use development to be constructed in multiple phases extending over

a period of 20 years, and which may include multi-family homes and/or other residential uses; professional space; recreational and/or entertainment events park; and, a multi-purpose municipal building that will include a gathering hall and administrative offices."

Pursuant to Section 8.05 of the Agreement, any dispute, claim or controversy between the parties was to be resolved first through negotiation, and then through arbitration. This section set forth the necessary procedures, requirements and time-frames to conduct arbitration. Either party could initiate negotiations by notifying the other party in writing the subject of the dispute and the relief sought. The party that received such a writing had ten days to respond with their position on and recommended solution to the dispute. If this did not resolve the dispute, then a representative of each party would meet within 30 days to attempt a resolution. If at this point there is still no resolution, the matter would be resolved through binding arbitration. Following arbitration, the party who was determined to be in default by breaching the Agreement had 120 days to cure or begin the process to cure any such default.

On May 30, 2013, Plaintiff notified Defendant by letter that it was in default, and enumerated the reasons for default. Plaintiff further notified Defendant that, because of this default, Plaintiff wished to either renegotiate or terminate the Agreement. Plaintiff had taken the first step outlined by Section 8.05 to resolve any dispute, but the parties never engaged in negotiations or arbitration.

On July 7, 2015, more than two years later, Plaintiff filed an Application and Order Extending Time to File Complaint to assert claims against Defendant for breach of contract by non-performance and breach of contract by repudiation of the Agreement. Plaintiff stated it was seeking damages in excess of $100,000.00, a jury trial, attorney's fees, and costs, and any further relief the court determined to be necessary and proper. The order extending time was granted.

On July 27, 2015, Plaintiff filed a complaint in this action alleging breach of contract, non-performance, anticipatory repudiation, and wrongful interference with contract. Plaintiff's prayer for relief included compensatory damages, attorney's fees, costs, and a demand for a jury trial.

On September 24, 2015, Defendant filed an Answer to Plaintiff's Complaint and Counterclaims. Defendant asserted multiple defenses, along with a counterclaim in which it alleged breach of contract and breach of duty of good faith by Plaintiff, and sought specific performance.

On October 7, 2015, Plaintiff and Defendant filed a joint motion for Recommendation for Designation of Exceptional Civil Case pursuant to Rule 2.1 of the General Rules of Practice for Superior and District Courts due to the complex evidentiary and legal issues involved in the case, as well as the voluminous amount of pretrial discovery anticipated by the parties. The Honorable Ola M. Lewis, Senior Resident Superior Court Judge for Brunswick County, entered an order on October 8, 2015, recommending the designation of this case as exceptional to the Honorable Mark D. Martin, Chief Justice of the North Carolina Supreme Court. On October 13, 2015, Chief Justice Martin ordered that the case be designated as exceptional pursuant to Rule 2.1, and also ordered that the Honorable Gary E. Trawick be assigned to handle all matters relating to the case.

On November 25, 2015, Plaintiff filed its reply to Defendant's counterclaims, asserting its defenses, and again requesting a jury trial. Counsel for Defendant forwarded a proposed Discovery Plan, Consent Confidentiality Order, and Scheduling Order to Plaintiff's counsel on December 30, 2015. Counsel for both parties met on February 10, 2016 to discuss this case. It was at this meeting that Plaintiff initiated a discussion of whether mediation and arbitration would be in the parties' interest. Plaintiff, however, did not assert its right to arbitration at this time. Defendant, anticipating continued litigation, moved forward with discovery by serving Plaintiff with Request for Admissions, Interrogatories, Requests for Production of Documents, and a Notice to Take Depositions.

On February 17, 2016, over 32 months after Plaintiff alleged it had notified Defendant of default, and over seven months after Plaintiff had instituted this action, Defendant received a letter from Plaintiff in which Plaintiff gave notice that it would be initiating negotiations pursuant to Section 8.05 of the Agreement.

The following day, Plaintiff filed and served Defendant with a Motion to Compel Arbitration and Stay Proceedings. Judge Trawick entered an order on March 14, 2016, staying the proceedings until a hearing could be held on the Motion.

In preparation for the hearing on the Motion to Compel Arbitration, Defendant served Plaintiff with a brief in opposition to its motion. Attached to the brief were affidavits of both Daniel L. Brawley and Jessica S. Humphries, counsel for Defendant, that reflected the amount of attorney's fees expended by Defendant in preparation for this litigation.

Plaintiff did not object to or contest the sufficiency of these affidavits at the hearing. At the conclusion of the hearing, Judge Trawick denied Plaintiff's motion, and asked that amended affidavits be submitted to the court that set forth with more specificity the actions Defendant had taken since the previous September.

An order was entered on April 13, 2016 denying Plaintiff's Motion to Compel Arbitration. It is from this order that Plaintiff timely appeals.

Analysis

We must initially note that, even though an order denying a party's motion to compel arbitration is interlocutory, "[it] is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citing *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983); N.C. Gen. Stat. §§ 1-277(a), 7A-27(d)(1) (1991)).

Plaintiff contends that the trial court erred in concluding that Plaintiff had waived its right to compel arbitration. Plaintiff specifically alleges that the evidence submitted by Defendant to substantiate the expenditures preparing for continued litigation was insufficient to support the court's findings. Plaintiff also argues that the trial court erred in concluding that the attorney's fees incurred by Defendant constituted sufficient prejudice for a finding that Plaintiff had waived its right to compel arbitration.

The trial court based its denial of Plaintiff's motion on the following conclusions of law:

> 1. A party has waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party is prejudiced by the order compelling arbitration.
>
> 2. The [Plaintiff] has waived any right to arbitration of the claims in this action by virtue of (a) its delay in demanding arbitration; (b) its actions taken inconsistent with a right to arbitration; (c) seeking designation of this case as [an] exceptional case under Rule 2.1 of the General Rules of Practice; (d) seeking significant involvement of the judiciary, and (e) the prejudice that would result to [Defendant] if the court were to order arbitration.

With regard to the trial court's findings of fact supporting these conclusions of law, Plaintiff specifically challenges the following findings as not being supported by the evidence:

> 27. [Plaintiff] has taken numerous actions inconsistent with any right to arbitration, to wit, instituting this action, making five filings in this action without any mention of arbitration but rather in two (2) filings requesting a jury trial, actively seeking a Rule 2.1 designation, and actively requesting and determining the availability of, a Special Judge to preside over this action.
>
> 29. An Order compelling arbitration would be prejudicial to [Defendant] in that it has incurred costs that it would not have incurred had [Plaintiff] not delayed in making its demand for arbitration. Those costs exceed $34,600 and relate to: participating in the process of the Rule 2.1 designation, reviewing the reply, communicating with opposing counsel, co-counsel, and client concerning litigation matters, preparing the Discovery Plan, Consent Confidentiality Order, and Scheduling Order, conference with opposing counsel, dealing with the proposed stay order, reviewing and responding to the Motion to Compel Arbitration and Stay Proceedings and Brief, and representing [Defendant] at the hearing on the Motion to Compel Arbitration and Stay Proceedings.

"Findings of fact, when supported by any evidence, are conclusive on appeal," *Fairchild Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 465, 98 S.E.2d 871, 876 (1957) (citations omitted), "even when there may be evidence to the contrary." *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980) (citations omitted). "While facts found below which are supported by the evidence are conclusive on this Court, we are not bound by the inferences or conclusions that the trial court draws from them." *Prime South Homes*, 102 N.C. App. at 258, 401 S.E.2d at 825 (citation omitted). "In accordance with these principles, we must determine whether there is evidence in the record which would support the trial court's findings of fact and if so, whether those findings of fact support the conclusion that plaintiff has waived its right to compel arbitration." *Id.*

In North Carolina, parties are free to contract and bind themselves to any terms that are not contrary to the public policies of this state or prohibited by statute. *Hlasnick v. Federated Mut. Ins. Co.*, 353 N.C.

240, 242-43, 539 S.E.2d 274, 276 (2000). In fact, North Carolina has a strong public policy in favor of resolving disputes through alternative dispute resolution mechanisms, such as arbitration. *See Prime South Homes*, 102 N.C. App. at 258, 401 S.E.2d at 825 (1991) ("[T]here exists in North Carolina a strong public policy in favor of settling disputes by arbitration.").

"Because of the strong public policy in North Carolina favoring arbitration, … courts must closely scrutinize any allegation of waiver of such a favored right." *Cyclone Roofing Co. v. Lafave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984) (citations omitted). A party has impliedly waived its contractual right to arbitration only if, by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration. *Id.* "A party may be prejudiced if, for example, ... by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon." *Id.* at 229-30, 321 S.E.2d at 876-77 (citations omitted).

Because Defendant has expended significant amounts of money in defense of Plaintiff's initiation of this suit, before Plaintiff belatedly demanded arbitration, we affirm the trial court's order based upon the prejudice to Defendant. Of the two findings of fact to which Plaintiff objects, the evidence which supports Findings 27 and 29 can be found in affidavits filed by Defendant in this action.

Defendant submitted affidavits of Daniel L. Brawley and Jessica S. Humphries which demonstrate that Defendant incurred costs in excess of $34,600.00 from the time of service of its Answer and Counterclaims to the Motion to Compel Arbitration. As the trial court detailed in Finding 29, Defendant did in fact "incur[ ] costs that it would not have incurred had [Plaintiff] not delayed in making its demand for arbitration." The evidence before the trial court tended to show that more than $34,600.00 was expended "in participating in the process of the Rule 2.1 designation, reviewing the reply, communicating with opposing counsel, co-counsel, and client concerning litigation matters, preparing the Discovery Plan, Consent Confidentiality Order, and Scheduling Order, conference with opposing counsel, dealing with the proposed stay order, and reviewing and responding to the Motion to Compel Arbitration and Stay Proceedings and Brief." The trial court concluded that, because Defendant had expended significant resources to prepare for litigation, an order compelling arbitration would result in prejudice to the Defendant.

Here, as in *Prime South Homes*, "[t]he accrual of these costs was by reason of [P]laintiff's delay in demanding arbitration and would not have been incurred had [P]laintiff made a timely demand." *Prime South Homes*, 102 N.C. App. at 261, 401 S.E.2d at 827.

Conclusion

In conclusion, the trial court's findings of fact are supported by the evidence and support its conclusions of law. Therefore, we affirm the judgment of the trial court that Plaintiff has impliedly waived its right to compel arbitration.

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

OLLIE WILLIAMS JR., PLAINTIFF

v.

RAMON ROJANO (BOTH PERSONALLY AND IN HIS ROLE OF FORMER DIRECTOR OF HUMAN SERVICES); REGINA Y. PETTEWAY (INTERIM DIRECTOR OF WAKE COUNTY HUMAN SERVICES); PATRICIA BAKER (BOTH PERSONALLY AND IN HER ROLE AS SOCIAL SERVICES DIRECTOR); LOUIS JACKSON; TOMIKO HICKS; WAKE COUNTY; WAKE COUNTY DEPARTMENT OF HUMAN SERVICES; WAKE COUNTY DIVISION OF SOCIAL SERVICES; AND SYSTEMS & METHODS, INC., D/B/A NORTH CAROLINA CENTRALIZED COLLECTIONS, DEFENDANTS

No. COA16-6

Filed 21 February 2017

1. Statutes of Limitation and Repose—excess garnishment of wages—back child support—continuing wrong—federal action

The statute of limitations barred plaintiff's claims arising from the excess garnishment of wages for back child support where plaintiff was or had reason to be aware of the violation when he received his first wage-garnished pay check, resulting in the three-year statute of limitations running approximately two years before the action was filed. The continuing wrong action does not apply to actions under 42 U.S.C. § 1983.

2. Constitutional Law—North Carolina Constitution—excess garnishment of wages

The trial properly dismissed claims under the North Carolina Constitution for the excess garnishment of wages for back child support where there were adequate state remedies.

3. Statutes of Limitation and Repose—excess garnishment—continuing wrong

Plaintiff's state claims for trespass to chattels, conversion, and negligence arising from the excess garnishment of wages for back child support were barred by the statute of limitations. The continuing wrong doctrine did not apply because the excess garnishment constituted continuing ill effects from the original garnishment, not continual violations.

4. Fraud—constructive—excess garnishment of wages—no fiduciary relationship

The trial court did not err by granting defendants' motion to dismiss plaintiff's claims for constructive fraud/breach of fiduciary duty by finding that plaintiff's complaint failed to state a claim upon which relief could be granted. The courts in North Carolina have not found a fiduciary relationship where the relationship between the parties is that of debtor-creditor.

5. Appeal and Error—objection below—no ruling obtained

Plaintiff's contentions concerning the allegations of opposing counsel and evidence were not considered on appeal where plaintiff did not receive a ruling on his objection below.

Appeal by plaintiff from order entered 13 July 2015 by Judge G. Bryan Collins Jr. in Wake County Superior Court. Heard in the Court of Appeals 24 May 2016.

Kisala Watkins Law Group, PLLC, by Andrew J. Kisala, for plaintiff-appellant.

Office of the Wake County Attorney, by County Attorney Scott W. Warren and Senior Assistant County Attorney Allison Pope Cooper, for defendant-appellees Ramon Rojano, Regina Y. Petteway, Patricia Baker, Louis Jackson, Tomiko Hicks, Wake County, Wake County Department of Human Services, and Wake County Division of Social Services.

Batten Lee PLLC, by Arienne P. Blandina for defendant-appellee Systems & Methods, Inc., d/b/a North Carolina Centralized Collections.

BRYANT, Judge.

Where the trial court did not err in dismissing plaintiff's claims for constructive fraud/breach of fiduciary duty, trespass to chattels, conversion, negligence, violations of the N.C. Constitution, as well as section 1983 claim, as barred by the statute of limitations, we affirm. Where plaintiff failed to obtain a ruling after an objection at trial, we decline to review the issue plaintiff attempts to appeal.

Plaintiff Ollie Williams, Jr., is the biological parent of a child who has since attained the age of majority. On 19 September 2001, a child support action was commenced against plaintiff by Lenoir County and an order of support was entered on 3 March 2002. Pursuant to the order, plaintiff agreed to a monthly child-support payment in the amount of $284.00, $50.00 of which would be applied toward arrears. Plaintiff also agreed to pay $15,052.00 in arrears at the rate of $50.00 per month as reimbursement for public assistance paid on behalf of his daughter.

On 7 September 2007, part of the initial $15,052.00 obligation was transferred to defendant Wake County for enforcement by Wake County Child Support enforcement. A year later, a hearing was held in Wake County wherein the trial court found that plaintiff was in arrears in the amount of $7,273.00. Plaintiff was held in civil contempt for failure to comply with the support order and thereafter ordered to be imprisoned in the Wake County jail until purge payments of $250.00 in total were made. The court then set plaintiff's child support obligation at $309.00 per month, consisting of $284.00 in ongoing support and $25.00 applied to arrears.

On 5 January 2009, defendant Wake County initiated income withholding against monies earned by plaintiff through employment with the City of Raleigh for the full amount of his monthly support obligation ($309.00), including arrears. On 3 September 2010, defendants[1] initiated income withholding against monies plaintiff earned through employment with Penske Logistics. In 2011, plaintiff's tax refunds totaling $4,138.30 were also intercepted.

---

1. As pled by plaintiff, defendants include the following individuals and entities: Ramon Rojano, the director of Wake County Department of Human Services for the time period relevant to this complaint; Regina Y. Petteway, current interim-director of Wake County Department of Human Services; Patricia Baker, current director of Wake County Division of Social Services; defendant Tomiko Hicks, the Child Support Program Manager; Louis Jackson, a Wake County Child Support Enforcement employee; and Systems and Methods, Inc., a corporation with a business operation in Raleigh, North Carolina, d/b/a North Carolina Centralized Collections ("SMI/Centralized Collections").

Pursuant to an order dated 12 April 2011, plaintiff's case was closed. However, defendant Wake County continued to enforce the unpaid arrearages through April 2013, at a rate of garnishment of $618.00 per month. In April 2013, when plaintiff's attorney contacted defendant Louis Jackson, a Wake County Child Support Enforcement employee, defendant Jackson stopped the garnishment of plaintiff's wages.

On 9 February 2015, plaintiff filed this action in Wake County Superior Court to recover monies taken from him in excess of the amount authorized by law. Specifically, plaintiff alleged that in 2010, his wages were garnished at double the rate allowable by the court's order. Plaintiff alleged that the approximate amount of $31,233.07 was taken from him, exceeding the amount he was legally required to pay in child support in arrears ($15,981.12) by approximately $15,241.95.

Defendants filed motions to dismiss which were heard in Wake County Superior Court on 29 June 2015. On 13 July 2015, the trial court entered an order dismissing with prejudice plaintiff's claims against all defendants and finding that plaintiff's complaint in its entirety failed to state a claim upon which relief could be granted. The trial court determined the claims for violation of the Fourteenth Amendment of the U.S. Constitution; Violation of Article I, Section 19 of the N.C. Constitution; Violation of 42 U.S.C. § 1983; Trespass to Chattels; Conversion; and Negligence, were all barred by the applicable statute of limitations. Plaintiff's claims for constructive fraud/breach of fiduciary duty were dismissed for failure to state a claim upon which relief can be granted. Plaintiff appeals.

On appeal, plaintiff contends the trial court erred by (I) granting defendants' motion to dismiss (A) plaintiff's U.S. constitutional and section 1983 claims, (B) plaintiff's N.C. constitutional claims, (C) plaintiff's claims for trespass to chattels, conversion, and negligence, (D) plaintiff's claims for constructive fraud/breach of fiduciary duty, and (E) the complaint in its entirety by finding it failed to state any claim upon which relief could be granted; and (II) considering allegations of counsel and evidence not contained or supported in the pleadings.

I

Plaintiff argues the trial court erred by granting defendants' motion to dismiss plaintiff's claims for (A) violation of the Fourteenth Amendment of the U.S. Constitution and 42 U.S.C. § 1983, (B) violation of Article 1, Section 19 of the N.C. Constitution, and (C) claims

for trespass to chattels, conversion, and negligence by finding that such claims were barred by the applicable statutes of limitations. Plaintiff further argues the trial court erred (D) in dismissing plaintiff's breach of fiduciary duty/constructive fraud claim for failure to state a claim and (E) in finding that the complaint in its entirety failed to state any claim upon which relief could be granted. We disagree.

Standard of Review

"This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods.*, Inc., 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Robinson v. Wadford, 222 N.C. App. 694, 696, 731 S.E.2d 539, 541 (2012) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979)). "The complaint must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Sain v. Adams Auto Grp.*, ___ N.C. App. ___, ___, 781 S.E.2d 655, 659 (2017) (quoting *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584–85 (2008)).

> A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has expired.

Bissette v. Harrod, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted) (quoting *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)).

A. Federal Claims (Fourteenth Amendment and 42 U.S.C. § 1983)

[1] "The three year statute of limitations as set forth in N.C.G.S. § 1-52 applies to 42 U.S.C. § 1983 actions brought in the North Carolina court system." *Faulkenbury v. Teachers' & State Emps.' Ret. Sys. of N.C.* (*Faulkenbury I*), 108 N.C. App. 357, 367, 424 S.E.2d 420, 424 (1993) (citing *Nat'l Advert. Co. v. City of Raleigh*, 947 F.2d 1158, 1162 n.2 (4th Cir. 1991)). A cause of action accrues, and the applicable statute of limitations begins to run, as soon as the right to institute and maintain a suit arises. *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985).

In the instant case, plaintiff's claims accrued in 2010, when plaintiff alleges his wages were first garnished at double the rate allowed by the contempt order, or at the latest in April 2011, when plaintiff claims there was no longer legal authority to garnish his wages. *See id.* Thus, applying the latest possible accrual date of April 2011, the three-year statute of limitations would have run as of April 2014, nearly one year prior to plaintiff's filing of the instant action on 9 February 2015. Plaintiff's complaint alleged the following:

> 56. Defendants garnished Plaintiff's wages at double the rate allowable by the Court's Order.
>
> 57. Pursuant to Order dated April 12, 2011, the case was closed.
>
> 58. Despite closure of the case, Defendants continued to garnish Plaintiff's wages at double the rate allowable by the Court's Order prior to closure of the case, which totaled $618.00 per month.
>
> 59. Defendants continued to garnish Plaintiff's wages until approximately April 2013, when Plaintiff's attorney contacted Defendant Jackson.
>
> 60. On or about 2011, Plaintiff's tax refunds were intercepted totaling approximately $4,138.30.
>
> 61. Upon information and belief, throughout the period between August 2008 and January 2011 additional amounts of money were withheld from Plaintiff by tax intercept totaling approximately $1,746.77.
>
> . . . .
>
> 64. At Plaintiff's rate of garnishment of $618.00 per month, Plaintiff had paid all amounts legally owed,

and satisfied all existing judgments and Orders on or before April 2011.

65. There was no legal authority to collect funds from Plaintiff after April 2011.

Plaintiff, however, argues that the "continuing wrong" doctrine applies. "The continuing wrong doctrine is an exception to the general rule that a cause of action accrues as soon as the plaintiff has the right to sue." *Stratton v. Royal Bank of Canada*, 211 N.C. App. 78, 86, 712 S.E.2d 221, 229 (2011) (citations omitted). In order to determine whether the "continuing wrong" doctrine applies, "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged must all be considered." *Ocean Acres Ltd. P'ship v. Dare Cnty. Bd. of Health*, 707 F.2d 103, 106 (4th Cir. 1983) (quoting *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)). "For the continuing wrong doctrine to apply, the plaintiff must show '[a] continuing violation' by the defendant that 'is occasioned by continual unlawful acts, not by continual ill effects from an original violation.' " *Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010) (quoting *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008)). *Compare Faulkenbury I*, 108 N.C. App. at 368–69, 424 S.E.2d at 425–26 (holding that the continuing wrong doctrine did not apply where plaintiffs "suffer[ed] from the continuing effects of the defendants' original action of amending a statute" for calculating plaintiffs' retirement benefits), *with Amward Homes, Inc. v. Town of Cary*, 206 N.C. App. 38, 57, 698 S.E.2d 404, 418 (2010) (holding that acceptance of illegal fees by the Town was a continuing wrong as each violation was the result of "continual unlawful acts" where "[e]ach time a builder-plaintiff applied for a permit and paid the fee to the town, the Town perpetuated its 'custom' . . . under 'color of . . . ordinance' to unlawfully deprive the builders of their money").

"When this doctrine applies, a statute of limitations does not begin to run until the violative act ceases." *Amward Homes, Inc.*, 206 N.C. App. at 56, 698 S.E.2d at 418 (quoting *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003)). "The tolling of the statute of limitations for section 1983 claims is governed by state law unless the state law is inconsistent with 'either § 1983's chief goals of compensation and deterrence or its subsidiary goals of uniformity and federalism[.]' " *Id.* at 57, 698 S.E.2d at 418 (alteration in original) (quoting *Hardin v. Straub*, 490 U.S. 536, 539, 104 L. Ed. 2d 582, 588–89 (1989)).

But this Court has previously declined to accept an almost identical argument put forth by plaintiffs facing a statute of limitations defense to their class action claim for unpaid retirement benefits. *See Faulkenbury I*, 108 N.C. App. at 363, 368, 424 S.E.2d at 422, 425 ("Our research uncovered no state cases in North Carolina where the continuing wrong doctrine was applied in a section 1983 case in which the statute of limitations had been raised as a defense."). Because we hold that the continuing wrong doctrine does not apply, *see infra* section C, and because we are persuaded that plaintiff was aware or had reason to know of the alleged violation when he received his first wage-garnished paycheck from his second place of employment, Penske Logistics, in September 2010, we overrule plaintiff's argument.

B. N.C. Constitutional Claim

[2] The statute of limitations for claims made under Article I, Section 19 of the North Carolina Constitution is three years. *See Staley v. Lingerfelt*, 134 N.C. App. 294, 297, 517 S.E.2d 392, 395 (1999). However, "[a] direct cause of action to enforce the rights contained in Article I of the North Carolina Constitution is permitted in circumstances where there is an 'absence of an adequate state remedy.' " *Amward Homes, Inc.*, 206 N.C. App. at 58, 698 S.E.2d at 419 (citation omitted) (quoting *Davis v. Town of S. Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994)). Here, there are adequate state remedies which were, in fact, pled by plaintiff: trespass to chattels, conversion, and negligence. *See infra* Section C. Accordingly, we affirm the trial court's dismissal of plaintiff's N.C. Constitutional claim.

C. Trespass to Chattels, Conversion, and Negligence Claims

[3] A claimant has three years from the date of accrual to bring their claims for trespass to chattels, conversion, and negligence. N.C. Gen. Stat. § 1-52(1) (2015). As stated previously, a cause of action accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. *Penley*, 314 N.C. at 20, 332 S.E.2d at 62. Plaintiff also argues the "continuing wrong" doctrine applies to toll the statutes of limitations for his claims for trespass to chattels, conversion, and negligence. We disagree.

In the instant case, plaintiff alleged that defendants initiated income withholding against monies earned by him at employment with the City of Raleigh and Penske Logistics on 5 January 2009 and 3 September 2010, respectively. Plaintiff alleged that "[d]efendants continued to garnish Plaintiff's wages until approximately April 2013[.]" As a plaintiff has

three years from the date of accrual to bring their claims for trespass to chattels, conversion, and negligence, see N.C.G.S. § 1-52(1), plaintiff's claims are barred, absent a tolling of the statute of limitations. Plaintiff's relevant allegations as to these claims are as follows:

[TRESPASS TO CHATTELS]

99. Defendants interfered with Plaintiff's right to exclusive use and possession by garnishing the wages from Plaintiff when they had no legal right, authority, or justification to do so in the following ways:

    a. By interrupting Plaintiff's physical possession of the monies;

    b. By interrupting Plaintiff's making ordinary use of the monies;

    c. By interrupting Plaintiff's benefit of the use of the monies;

. . . .

[CONVERSION]

104. The Defendants' pursuit, enforcement, collection and disbursement of monies in excess of Plaintiff's legal obligation constitute a conversion, as it was an unauthorized assumption and exercise of the right of ownership over the property belonging to the Plaintiff, to the exclusion of the Plaintiff's ownership rights.

. . . .

[NEGLIGENCE]

113. The Defendants owed a duty to all obligors, including Plaintiff, to enforce the State's Child Support Enforcement Program in accordance with federal and state law.

114. The Defendants breached this duty owed to the Plaintiff as follows:

    a. By collecting money from Plaintiff by garnishment for the full amount from each of Plaintiff's two (2) jobs at double the rate and in violation of all existing Order and judgments in this case.

b. By intercepting tax refunds due to Plaintiff at a rate and amount in excess of any Order of Judgment in this case.

c. By refusing to return said funds to Plaintiff after these errors were discovered.

d. By failing to adopt adequate procedures to ensure that funds were not being taken from obligors against whom they initiated and enforced actions at rate and/or amount in excess of existing Orders and Judgments.

e. by failing to exercise their authority to obtain information from other departments in the State pursuant to N.C. Gen. Stat. §§ 110-128 et. seq. to determine the obligor's required amount and rate of payment.

. . . .

115. These multiple breaches proximately caused the Plaintiff's wages to be garnished, and his tax refunds to be intercepted, and forced the Plaintiff to make payments to SMI/Centralized Collections.

As stated previously, "in order for the continuing wrong doctrine to toll the statute of limitations, the plaintiff must show '[a] continuing violation' by the defendant that 'is occasioned by continual unlawful acts, *not by continual ill effects from an original violation*.' " *Stratton*, 211 N.C. App. at 86, 712 S.E.2d at 229 (alteration in original) (quoting *Marzec*, 203 N.C. App. at 94, 690 S.E.2d at 542). In *Stratton*, this Court held that "the continued deprivation of shareholder rights and nonpayment of dividends were not continual violations, but rather 'continual ill effects' of the conversion" of the plaintiff's stock. *Id.* at 87, 712 S.E.2d at 230. Furthermore, this Court characterized the conversion of the plaintiff's stock as a "discrete occurrence—not a cumulative one—that should have been discovered through reasonable diligence." *Id.* at 87, 712 S.E.2d at 229.

We believe the alleged double garnishment of plaintiff's wages that took place each month until April 2013 did not constitute "continual violations, but rather 'continual ill effects' " of the original garnishment, instituted in order to collect plaintiff's child support obligation. *See id.* at 87, 712 S.E.2d at 230. Similar to this Court's characterization in *Stratton*,

the garnishment of plaintiff's wages in the instant case was also a "discrete occurrence," despite the arguably cumulative effect of the garnishment (plaintiff alleges he overpaid by approximately $15,241.95). *See id.* at 87, 712 S.E.2d at 229. Certainly the alleged double garnishment was discoverable to plaintiff as soon as defendants initiated income withholding ($309.00/month) from plaintiff's second place of employment, Penske Logistics, on 3 September 2010, for a total of $618.00 garnished from plaintiff's total combined wages each month.

Lastly, in looking to "[t]he particular policies of the statute of limitations in question, as well as the nature of the wrongful conduct and harm alleged," *id.* at 86, 712 S.E.2d at 229 (quoting *Williams*, 357 N.C. at 179, 581 S.E.2d at 423), applying the continuing wrong doctrine under these facts would allow plaintiffs to bring claims decades after their accrual in order to contest any alleged wrongful wage garnishment in child support actions. In this case, the "continuing wrong" doctrine does not apply, and plaintiff's argument is overruled.

D. Constructive Fraud/Breach of Fiduciary Duty Claim

[4] Plaintiff next argues the trial court erred in granting defendants' motion to dismiss plaintiff's claims for constructive fraud/breach of fiduciary duty by finding that plaintiff's complaint failed to state a claim upon which relief could be granted. Specifically, plaintiff contends a fiduciary relationship existed between plaintiff and defendants. We disagree.

"A claim for breach of fiduciary duty requires the existence of a fiduciary relationship." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293, 603 S.E.2d 147, 155 (2004).

> In general terms, a fiduciary relation is said to exist "[w]herever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence."

Id. (quoting *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951)).

Regarding the connection between breach of fiduciary duty and constructive fraud, "[t]o survive a motion to dismiss, a cause of action for constructive fraud must allege (1) a relationship of trust and confidence, (2) that the defendant took advantage of that position of trust in order to benefit himself, and (3) that plaintiff was, as a result, injured." *Id.* at 294, 603 S.E.2d at 156 (citing *Sterner v. Penn*, 159 N.C. App. 626, 631, 583 S.E.2d 670, 674 (2003)). "The primary difference between pleading a

claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself." *Id.*

In the instant case, plaintiff alleged in his verified complaint as follows:

> 118. By virtue of the Defendants' dealings with the Plaintiff as more particularly described herein, as well as the duty and obligation to work with all parties subject to a child support action, the Defendants created a fiduciary relationship and responsibility to the Plaintiff.
>
> 119. The Defendants took advantage of their position of trust to the detriment of the Plaintiff, and thus breached their fiduciary duty.
>
> 120. The Defendants breached this fiduciary duty owed to the Plaintiff as follows:
>
> a. by continuing to collect funds from Plaintiff through garnishment after all amounts legally owed had been paid and satisfied.
>
> b. By collecting funds from Plaintiff through garnishment in a rate and amount exceeding what Defendants could lawfully collect pursuant to Judgment or Order.
>
> c. by failing to adopt adequate procedures to ensure that the obligors against whom they initiated and enforced actions seeking support still owed the money being collected through garnishment[.]
>
> . . . .
>
> 121. Upon information and belief, the Defendants took advantage of their position of trust by the collection of child support payments, and as a result, the Plaintiff has been damaged as herein alleged.

However, plaintiff has cited to no authority which would support his conclusion that defendants owed plaintiff a fiduciary duty. To the contrary, North Carolina courts have declined to find that a fiduciary relationship exists where the relationship between the parties is that of debtor-creditor. *See Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 95, 143 S.E.2d 270, 276 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor.");

Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 61, 418 S.E.2d 694, 699 (1992) ("[T]he mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship." (second alteration in original) (citations omitted)).

A fiduciary relationship arises when, due to considerations of law and equity, a fiduciary must set aside his or her own best interests in favor of the beneficiary's best interests. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367, 760 S.E.2d 263, 266 (2014). Here, the relationship between plaintiff and defendants was adversarial in nature; defendants were charged with enforcing the support orders from the court, and in doing so, were authorized to institute wage withholding against plaintiff. Thus, this relationship is more akin to that of debtor-creditor, a relationship that has not been recognized as a fiduciary one. *See Sec. Nat'l Bank of Greensboro*, 265 N.C. at 95, 143 S.E.2d at 276.

Further, plaintiff does not allege that this relationship parallels any special relationship our courts have found to constitute a fiduciary one. *See*, *e.g.*, *Eubanks v. Eubanks*, 273 N.C. 189, 195–96, 159 S.E.2d 562, 567 (1962) (husband-wife); *Fox v. Wilson*, 85 N.C. App. 292, 299, 354 S.E.2d 737, 742 (1987) (attorney-client). Plaintiff's mere allegation that defendants had an "obligation to work with all parties subject to [the] child support action," does not give rise to a fiduciary duty. Accordingly, because no fiduciary relationship existed between plaintiff and defendants, the trial court did not err in dismissing plaintiff's claim for breach of fiduciary duty/constructive fraud. Plaintiff's argument is overruled.

E. Failure to State a Claim

As we have determined that the respective statutes of limitations bar plaintiff's section 1983 claims and claims for trespass to chattels, conversion, negligence, and state constitutional violations, and that the trial court did not err in dismissing plaintiff's claim for breach of fiduciary duty/constructive fraud, we also affirm that portion of the trial court's order dismissing plaintiff's claim in its entirety for failure to state a claim.

II

[5] Next, plaintiff contends the trial court improperly considered allegations of counsel and/or evidence not contained or supported in the pleadings. As such, plaintiff argues, the trial court's order dismissing plaintiff's complaint should be reversed and this matter remanded for further proceedings. However, as plaintiff did not receive a ruling on his objection below, this issue is not properly preserved for our review.

In order to properly preserve error, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10. (2015). "[I]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

Reviewing the record and transcript on appeal, the only time plaintiff's counsel objected throughout the proceeding was when counsel for defendants discussed the issue of improper service on an individual not related to plaintiff's case. Plaintiff's attorney objected, stating, "I'm going to object to this. I believe [counsel] is testifying as to something that has no basis at all in evidence." Notably, the trial court did not render a ruling in response, but merely stated, "I'm going to let you talk when it's your turn to talk." Accordingly, having failed to obtain a ruling at the lower court, *see id.*, we decline to review plaintiff's issue on appeal.

In conclusion, we hold the trial court did not err in dismissing plaintiff's claims for constructive fraud/breach of fiduciary duty, violation of the N.C. Constitution, as well as plaintiff's section 1983 and tort claims. The order of the trial court is

AFFIRMED.

Judges TYSON and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 FEBRUARY 2017)

BANK OF OZARKS v. KINGS MOUNTAIN PROPS.,LLC No. 16-739	Mecklenburg (15CVS9933)	Affirmed
CHURCH v. NORELLI No. 16-799	Caldwell (15CVS1016)	Reversed
HUCKABEE v. ROBERTS No. 16-603	Durham (09CVD307) (15CRS2245)	Reversed and Remanded
IN RE B.W.S. No. 16-850	Surry (14JT53) (14JT54)	Affirmed
IN RE FORECLOSURE OF ADAMS No. 16-653	Mecklenburg (15SP383)	Affirmed
IN RE O.J.W. No. 16-783	Wake (14JA48-49)	Affirmed
IN RE R.L.D. No. 16-821	Northampton (14JT16)	Affirmed
IN RE V.G. No. 16-733	Wake (14JT183)	Affirmed
KENNEDY v. HARRIS TEETER No. 16-727	N.C. Industrial Commission (14-000917)	Affirmed
LYNN v. FUTRELL No. 16-743	Halifax (11CVD1203)	Vacated and Remanded
MASTNY v. MASTNY No. 16-440	Wake (11CVD14976)	Affirmed in part; reversed in part and remanded.
PENNINGA v. TRAVIS No. 16-751	Madison (11CVD317)	Vacated and Remanded
STATE v. BAKER No. 16-708	Orange (14CRS169) (14CRS50404) (14CRS50423) (14CRS50424) (14CRS50426) (15CRS124)	No Error

STATE v. BYRD No. 16-619	Stanly (13CRS51641)	No Prejudicial Error
STATE v. CLAY No. 16-564	Cabarrus (13CRS54149) (13CRS54151)	Affirmed
STATE v. DAVIS No. 16-288	Forsyth (12CRS55599-602)	No Error
STATE v. HIGGINS No. 16-404	Burke (13CRS52351)	No Error
STATE v. HUDSON No. 16-431	Mecklenburg (14CRS20721-23)	No Error
STATE v. HUDSON No. 16-571	New Hanover (13CRS56047-48)	DISMISSED IN PART; NO ERROR IN PART.
STATE v. LASSITER No. 15-1216	Pitt (14CRS51675)	No Error
STATE v. LITTLE No. 16-480	Beaufort (05CRS52742)	Affirmed
STATE v. MACE No. 16-703	Haywood (14CRS53412) (14IFS703562)	No Error
STATE v. MACK No. 16-561	Mecklenburg (12CRS251525-26)	NO PREJUDICIAL ERROR.
STATE v. MODLIN No. 16-634	Alamance (14CRS54385)	Vacated and Remanded
STATE v. NORRIS No. 16-683	New Hanover (15CRS1309-1311)	Affirmed and Remanded
STATE v. PITT No. 16-709	Pitt (14CRS60587) (15CRS803)	No Error
STATE v. STEWART No. 16-347	Guilford (14CRS82246)	No Error
STOWERS v. PARKER No. 16-747	Davie (14CVS32)	Appeal dismissed.
WRIGHTSVILLE HEALTH HOLDINGS, LLC v. BUCKNER No. 16-726	New Hanover (16CVD526)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS